SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC., APPELLANT,

vs.

WILLIAM WILSON, AS COMMISSIONER OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

QUEENSIDE HILLS REALTY CO. INC., Plaintiff-Appellant,

against

WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York, Defendant-Respondent

STATEMENT UNDER RULE 234

This is an appeal from a resettled order and judgment of Special Term, New York County, granting defendant's motion for judgment on the pleadings, and dismissing the complaint in an action for an injunction and a declaratory judgment.

The action was commenced by the service of a summons and complaint on July 12, 1944.

Issue was joined by the service of an answer on October 14, 1944.

George G. Lake, Esq., appeared for the plaintiff. Ignatius M. Wilkinson, Esq., Corporation Counsel for the City of New York, appeared for the defendant. There has been no change of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

QUEENSIDE HILLS REALTY CO. INC., Plaintiff,

against

WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York, Defendants

NOTICE OF APPEAL FROM JUDGMENT

SIRS:

Please take notice that the plaintiff hereby appeals to the Appellate Division of the Supreme Court for the First

Judicial Department from the judgment entered herein on December 19, 1944, dismissing the complaint herein.

Dated, New York, December 20, 1944.

Yours, etc., George G. Lake, Attorney for Plaintiff, Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, City of New York.

To Ignatius M. Wilkinson, Esq., Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York. Archibald R. Watson, Clerk of the above Court.

[fol. 3] IN SUPREME COURT OF NEW YORK

JUDGMENT APPEALED FROM

The defendant having moved for judgment on the pleadings dismissing the complaint, and an order having been duly entered herein on or about the 26th day of October 1944 as resettled by an order entered on or about the 13th day of December 1944 granting the motion and dismissing the complaint,

Now on motion of Ignatius M. Wilkinson, Corporation Counsel, attorney for defendant, it is

Adjudged that the complaint be and the same hereby is dismissed.

Dated, December 19, 1944.

Archibald R. Watson, Clerk.

[fol. 4] IN SUPREME COURT OF NEW YORK

NOTICE OF APPEAL FROM RESETTLED ORDER

SIRS:

Please take notice that plaintiff hereby appeals to the Appellate Division of the Supreme Court for the First Judicial Department from the resettled Order and Judgment of Mr. Justice Walter, dated December 12, 1944 and filed herein on December 12, 1944, granting the application of

defendant for Judgment on the pleadings and dismissing the complaint.

Dated, New York, December 19, 1944.

Yours, etc., George G. Lake, Attorney for Plaintiff, Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, City of New York.

To Ignatius M. Wilkinson, Esq., Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York. Archibald R. Watson, Clerk of the above Court.

[fol. 5] In Supreme Court of New York, County of New York, Special Term—Part III

Resettled Order Appealed From—December 12, 1944

Present: Hon. Carroll G. Walter, Justice

Upon the annexed consent and on motion of Ignatius M. Wilkinson, Corporation Counsel, attorney for defendant, it is

Ordered that the order entered herein in the office of the Clerk of the County of New York on the 26th day of October, 1944, be and the same hereby is resettled so as to read as follows:

"New York Supreme Court, County of New York, Special Term—Part III

Index Number 17442—Year 1944

Present: Hon. Carroll G. Walter, Justice

Queenside Hills Realty Co. Inc., Plaintiff,

against

William Wilson, as Commissioner of Housing and Buildings of the City of New York, Defendant

[fols. 6-8] The following papers numbered 1 to 8 read on motion (Argued, Decision Reserved) this 25th day of October, 1944.

Motion Calendar No. 304

Papers Numbered

Notice of Motion and Pleadings annexed and Exhibits . . . . . 1 to 8

Upon the foregoing papers this motion by defendant for judgment dismissing the complaint is granted and the Clerk is directed to enter judgment accordingly.

Dated, October 26, 1944.

Enter.

C. G. W., J. S. C."

Filed Dec. 12, 1944, New York County Clerk's Office.

Enter.

C. G. W., J. S. C.

We hereby consent to the entry of the foregoing order.

Dated, December 7, 1944.

George G. Lake, Attorney for Plaintiff. Ignatius M. Wilkinson, Corporation Counsel, Attorney for Defendant.

[fol. 9] IN SUPREME COURT OF NEW YORK

NOTICE OF MOTION FOR JUDGMENT ON THE PLEADINGS

SIR:

Please Take Notice, that upon the complaint and the answer herein, true copies of which are hereto annexed, the undersigned will move at Special Term, Part III, of the Supreme Court, in and for the County of New York, at the County Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 20th day of October, 1944, at 10 A. M., or as soon thereafter as counsel can be heard, for judgment on the pleadings, dismissing the complaint herein, and for such other and further relief as may be proper.

Dated, N. Y., October 13th, 1944.

Yours, etc., Ignatius M. Wilkinson, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To: George G. Lake, Esq., Attorney for Plaintiff, 38 Park Row, New York, N. Y.

[fol. 10] In Supreme Court of New York, County of New York

Queenside Hills Realty Co. Inc., Plaintiff,

against

William Wilson, as Commissioner of Housing and Buildings of the City of New York, Defendant

Summons

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, July 10th, 1944.

George G. Lake, Attorney for Plaintiff, Office & P. O. Address, 38 Park Row, Borough of Manhattan, City of New York.

[fol. 11] In Supreme Court of New York

Complaint

Plaintiff, by George G. Lake, its attorney, complaining of the defendant, respectfully shows:

For a First Cause of Action:

1. That at all times hereinafter mentioned, plaintiff was and still is a domestic corporation.

2. That at all times hereinafter mentioned, defendant was and still is Commissioner of Housing and Buildings of the City of New York.

3. That at all times hereinafter mentioned, plaintiff was and still is the owner and operator of a lodging house known as the Clover Hotel, at premises Numbers 312-314 Bowery, Borough of Manhattan, New York City.

4. That the building in which said lodging house is conducted is a four story and cellar brick building, which was built in the year 1940 and which occupies a plot having a frontage of approximately fifty feet on the Bowery and having depth of approximately one hundred feet on each side.

5. That on January 15, 1941, defendant, by the then Borough Superintendent of the Borough of Manhattan, Chester W. Cambell, issued to plaintiff, Certificate of Occupancy #27234, covering said premises, which are Lot 75 in Block 521 on the land map of the County of New York, which certificate of occupancy certified that said building known as Number 312-14 Bowery, conformed to the require-[fol. 12] ments of the Building Code, and all other laws, including the Multiple Dwelling Law, applicable to said building. That said building in fact did and still does comply with the Multiple Dwelling Law, the Administrative Code of the City of New York, and all other laws and regulations applicable thereto.

6. That said building at all times mentioned herein, was and still is in fact in all respects, built in accordance with the latest and most approved methods of construction; that said building is in every respect safe and proper for occupancy as a lodging house.

7. That said building contains only open dormitories and has no cubicles; that the first tier of beams in said building is fireproof; that said building is equipped with an open circuit fire alarm system throughout the building; that said building is equipped with a completely enclosed fireproof stair exit, as well as a fire escape; that said building contains a fireproof passageway from the rear yard of said building to the street; that said building has constant watchman service, and that said building does not and has not at any time constituted a fire hazard or a danger to the occupants thereof, or a public nuisance.

8. That prior to the year 1929 there were many old buildings in the City of New York, which were used as lodging houses.

9. That prior to the year 1929 many buildings in the City of New York used as multiple dwellings, contained inadequate provisions for light and air, and insufficient protec-

tion against, and defective provision for, escape from fire, and improper sanitation.

[fol. 13] 10. That by reason of said facts, the Legislature of the State of New York, in the year 1927, created a Commission for the purpose of investigating conditions in multiple dwellings. That said Commission held lengthy hearings, heard witnesses on the subject, investigated the same, and duly made a report to said Legislature thereon.

11. That after receiving said report, the Legislature of the State of New York adopted what later became Chapter 713 of the laws of 1929, known as the Multiple Dwelling Law. That said Multiple Dwelling Law was based on a legislative finding, as is stated in Section 2 thereof.

12. That prior to the Multiple Dwelling Law, lodging houses in the City of New York were regulated by the Charter of the City of New York and ordinances adopted pursuant thereto and were not subject to any State Dwelling or Housing law. That lodging houses were brought within the purview of the Multiple Dwelling Law by the enactment thereof.

13. That all lodging houses built within the City of New York subsequent to the enactment of the Multiple Dwelling Law, were built in accordance with said Multiple Dwelling Law as well as all other laws, rules and regulations applicable thereto; that all such lodging houses are proper and safe in every respect and are so constructed as not to constitute a fire hazard or a public nuisance.

14. That this action is brought on behalf of all lodging house owners and operators described in paragraph 13 hereof and that the facts set forth herein apply with equal force to all such other persons and properties.

[fol. 14] 15. That since 1929, there has been no legislative investigation of conditions with reference to lodging houses and other multiple dwellings in the City of New York; nor has any resolution or law been enacted by the Legislature, finding that lodging houses built since the enactment of the Multiple Dwelling Law constituted a danger to the health, safety, morals, welfare or reasonable comfort of the citizens of this State.

16. That since 1929 and the erection of this lodging house, no general advancements have been made in the methods of

building construction or safety measures affecting lodging houses in the City of New York.

17. That at no time has any fire occurred in any lodging house built since the year 1929 in which there has been any loss of life, and that the safeguards imposed by the Multiple Dwelling Law as it existed on April 4, 1944, and other laws and regulations applicable thereto, are in all respects adequate and sufficient to prevent loss of life.

18. At its 1944 session, the Legislature of the State of New York passed what later became Chapter 553 of the Laws of 1944.

19. By reason of the enactment of said Chapter, defendant caused to be placed against said premises known as the Clover Hotel, and more fully described herein, an alleged violation, copy whereof is hereto annexed, marked "Exhibit I" and incorporated by reference.

20. That said "Exhibit I" is improper and indefinite insofar as the same does not point out the conditions which are claimed to constitute a violation in said building.

[fol. 15] 21. That under any circumstances subdivisions "a", "b", "c", "e", "f", "g", "i", "k", "m", "n", "q", "s", "t", of the instruction sheet annexed to "Exhibit I" have no application to the building in question, since the conditions described in said subdivisions either have been complied with under existing law or do not exist at plaintiff's said building.

22. That the building known as the Clover Hotel has a market value of approximately $25,000.00; that the cost of complying with any applicable parts of said violation is the sum of approximately $7,500.00; and that the benefit to be obtained by complying with any applicable parts of said violation is negligible.

23. That plaintiff has no adequate remedy of law.

24. That said law is unconstitutional and void for the following reasons:

(a) Said law deprives plaintiff and all persons similarly situated of an equal protection of the laws, since under said Chapter 553 of the laws of 1928 and under the Multiple Dwelling Law as the same now exists, any person may

lawfully erect a building in the same locality as plaintiff's and in all respect similar to plaintiff's building, and operate the same, without any legal necessity for complying with Chapter 553 of the laws of 1944.

(b) Said law is unreasonable and confiscatory by reason of the fact that compliance with the same would require a large expenditure of money with very little benefit and without any necessity therefor and without any finding by [fol. 16] any competent legislative body that any condition exists requiring the exercise of the police power of the State of New York.

(c) Said law is discriminatory and void by reason of the fact that it makes no distinction between buildings in existence prior to the enactment of the Multiple Dwelling Law, and buildings built subsequent to the enactment of the Multiple Dwelling Law and in full compliance therewith.

25. That by reason of the facts herein stated, the actions taken and threatened by defendant are calculated to and will cause plaintiff irreparable damage unless defendant is restrained.

For a Second Cause of Action

26. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs "1" to "23" hereof, with the same force and effect as if said paragraphs were herein set forth at length.

27. That the provisions of Section 13 of the Multiple Dwelling Law as amended by Chapter 553 of the laws of 1944 were not intended to and do not apply to plaintiff's building, but are intended to apply and apply only to buildings existing prior to the enactment of the Multiple Dwelling Law.

28. That by reason of said facts, defendant's action in placing said alleged violation as stated in "Exhibit 1" annexed to the complaint against plaintiff's premises is illegal and void.

Wherefore, plaintiff demands judgment as follows:

[fol. 17] 1. Declaring null, void and of no effect, the provisions of Chapter 553 of the laws of 1944 insofar as the same purport to plaintiff's building and buildings similarly situated.

2. Enjoining and restraining the defendant during the pendency of this action and permanently from taking any steps or proceedings to enforce or threatening to enforce the provisions of Chapter 553 of the laws of 1944 insofar as the same attempt to affect plaintiff's building or buildings similary situated.

3. Directing defendant to remove of record against plaintiff's premises, the violation described in "Exhibit I" annexed hereto.

4. Directing defendant to remove of record any similar violations against premises similarly situated.

5. Granting plaintiff such other, further and different relief as may be just, together with the costs of this action.

George G. Lake, Attorney for Plaintiff, Office & P. O. Address, 38 Park Row, Borough of Manhattan, City of New York.

(Verified by James Berintendi, President of plaintiff, on July 10, 1944.)

[fol. 18] EXHIBIT I TO COMPLAINT

DEPARTMENT OF HOUSING AND BUILDINGS, CITY OF NEW YORK

Notice of Violation of the Multiple Dwelling Law

Premises: 312/14 Bowery

Date: April 21, 1944,
Borough: Man.

Violations

No. 4 In violation of Section 13 of the Multiple Dwelling Law as amended by Chapter 553 of the Laws of 1944, the 1st, 2nd, 3rd and 4th stories are being occupied for lodging house purposes as defined in Subdivision 7 of Section 4 of such law. You are hereby ordered to discontinue the unlawful use and occupancy of the stories specified above or to file an alteration application and plans and make all parts of

the building conform to all the requirements of the Multiple Dwelling law.

Note: Attached hereto is a sheet, dated April 17, 1944, containing instructions for the filing of an alteration application and plans; also, a resume of some of the important provisions of Section 13 as amended by Chapter 553 of the Laws of 1944, effective April 5, 1944.

KEEP THIS NOTICE—THE FEE FOR A DUPLICATE IS $1.00

(Page #2)

[fol. 19] DEPARTMENT OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK

April 17, 1944.

Instructions

For the Filing of Alteration Applications and Plans for Existing Non-Fireproof Lodging Houses

Under the provisions of Chapter 553 of the Laws of 1944, effective April 5, 1944, all existing lodging houses are required to comply with the provisions of Section 13 of the Multiple Dwelling Law as amended. A resume of some of the important provisions of this section as amended follows:

General

3. (a) All wood or other combustible facing shall be removed from the walls, partitions and ceilings of the entrance halls, public halls and public stairs.

(b) All wood soffits, fascias, railings, balustrades and newel posts shall be removed and be replaced with metal or other hard incombustible material. Arrangement of same must be shown on the plans.

(c) Interior partition sash windows in the public halls, which do not open to the outer air and which are not used in the operation of the lodging house, shall be removed and the openings closed up and fire retarded.

[fol. 20] (d) The entire building shall be provided with an automatic wet pipe sprinkler system. In connection with such system there shall be an automatic

closed circuit fire alarm system so arranged and installed as to give warning at a recognized central station approved by the Fire Department. Such sprinkler and alarm systems shall have supervisory and maintenance service.

(e) If all entrance halls, public halls and stair halls are not fire retarded in accordance with the rules and regulations of the Department, such portions of the building shall be fire retarded. Method of fire retarding must be shown on the plans.

(f) All doors opening upon entrance halls public halls, stair halls or public stairs shall be self-closing fireproof doors, and such doors shall not be held open by any device whatever.

(g) The cellar ceiling and the ceiling of each story above such cellar shall be fire retarded.

(h) Except partitions forming the enclosures of existing cubicles, all wood partitions and all combustible covering on walls or partitions throughout the portion of the building used for lodging house purposes shall be removed or protected with incombustible material approved by the Department.

(i) Main aisles providing access to required means of egress shall be not less than 3 feet in width, and [fol. 21] all aisles, cubicles, and beds in open dormitories shall be shown on the plans.

(j) "EXIT" signs, with letters 8 inches in height and with red lights (in keyless sockets) not less than 25 watts, and illuminated directional signs are required, and the location of same shall be shown on the plans. At least one such sign shall be easily visible from the doorway of each cubicle.

(k) Access from the public hall at the top story to the roof shall be by means of scuttle or bulkhead. The size and arrangement shall be shown on the plans.

(m) Two remote means of egress shall be provided from each story. One of such means of egress shall be to an enclosed stair. Arrangement and location of both means of egress must be shown on the plans.

(n) All openings on the course of a fire-escape shall be provided with automatic, self-closing, fireproof, wire glass window assemblies or self-closing, fire-proof door assemblies acceptable to the Department.

(o). A completely enclosed room or compartment shall be provided for the storage of mattresses, linens, brooms, mops, and other paraphernalia. Enclosing partitions shall be fire-resistive and shall be shown on the plans. Compartments in which mattresses are stores shall be provided with a window 10 square feet in area and shall open on a street or yard.

[fol. 22] (p) There shall be provided on each floor one or more containers of metal or other hard incombustible material, with self closing lid, in which all scrap and refuse of a combustible nature shall be placed until finally disposed of.

(q) Ceilings and floors adjoining any furnace, stove, boiler, or hot-water heater shall be fire retarded. Metal breechings and flues connected to such devices shall be properly secured.

(r) No insecticide containing inflammable or combustible materials shall be stored without a permit from the Fire Department, and no such inflammable or combustible insecticide shall be stored except in a completely enclosed room or compartment of fire-resistive construction. The location of such room or compartment shall be shown on the plans. Such rooms or compartments shall be ventilated.

(s) The top of the enclosure of every cubicle shall be at least 2 feet from the ceiling.

(t) Existing cubicles complying with the provisions of this section may be maintained. The location and arrangement of all cubicles must be shown on the plans.

(u) All parts of every lodging house shall be inspected by a clerk or watchman at least once in every two hours.

[fol. 23] Stairs and Fire-Escapes

The number of persons accommodated on any story in a lodging house shall not be greater than the sum of the following components:

Twenty-two persons for each full multiple of 22 inches in the smallest clear width of each means of egress approved by the Department, other than a fire-escape.

Twenty persons for each regulation fire-escape accessible from such story if it is above the entrance story.

The arrangement and clear width of the stairs from the entrance to the top story and the location and terminus of each fire-escape shall be shown on the plans.

Note: Under the provisions of Subdivision 6 of Section 13 as amended by Chapter 553 of the Laws of 1944, the Department is required to inspect all lodging houses at intervals of not more than three months. In the process of making these mandatory inspections the sanitary conditions of the premises will be observed for possible violations of rules and regulations adopted by the Department pursuant to the provisions of Sections 160 and 885 of the New York City Charter governing the conduct and maintenance of lodging houses in the City of New York.

[fol. 24] In Supreme Court of New York

Answer

The defendant appearing by Ignatius M. Wilkinson, Corporation Counsel, answering the complaint of the above-named plaintiff, alleges as follows:

First. Denies each and every allegation contained in paragraphs of the plaintiff's complaint marked "6," "20," "21," "23," "24," and subdivisions, "25," "27," and "28."

Second. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs of plaintiff's complaint marked "1," "3," "4," "7," "8," "9," "14," "15," "16," and "22."

Third. Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "5" of plaintiff's complaint, except that he admits that certificate of occupancy numbered 27234 was issued and denies that the building complies with the Multiple Dwelling Law.

Fourth. Denies each and every allegation contained in paragraph "13" of plaintiff's complaint, which alleges "that all such lodging houses are proper and safe in every respect and are so constructed as not to constitute a fire hazard or a public nuisance."

Fifth. Admits so much of paragraph numbered "26" of the complaint as has not already been expressly denied [fol. 25] or with respect to the matters of which he has not already denied any knowledge or information sufficient to form a belief.

Sixth. Denies each and every allegation contained in paragraph of the complaint marked "17" except denies any knowledge or information sufficient to form a belief as to whether any fire occurred in any lodging house built since 1929 in which there was any loss of life.

As and for a First, Separate, and Affirmative Defense, Defendant Further Alleges

Seventh. That the Temporary Commission was appointed in May, 1927, to examine and revise the Tenement House Law. This commission was created under authority of Chapter 569 of the Laws of 1927 and Chapter 519 of the Laws of 1928 and on February 4, 1929, reported its findings to the Legislature of the State of New York. Annexed hereto and made a part of this answer, marked Exhibit "A," is a copy of such report.

Eighth. That legislative findings were incorporated in the Multiple Dwelling Law, reading as follows:

> "Section 2. Legislative Finding. It is hereby declared that intensive occupation of multiple dwelling sites, overcrowding of *of* multiple dwelling rooms, inadequate provision for light and air, and insufficient protection against and defective provisions for escape from fire, and improper sanitation of multiple dwellings in certain areas of the state are a menace to the

health, safety, morals, welfare, and reasonable comfort of the citizens of the state; and that the establish- [fol. 26] ment and maintenance of proper housing standards requiring sufficient light, air, sanitation and protection from the fire hazards are essential to the public welfare. Therefore, the provisions hereinafter prescribed are enacted and their necessity in the public interest is hereby declared as a matter of legislative determination."

Ninth. That from time to time the Multiple Dwelling Law, which is aimed at making multiple dwellings safer places in which to live and to provide for proper protection from fire hazards, was amended.

Tenth. That the premises known as 312-314 Bowery, in the Borough of Manhattan, City of New York, consist of a non-fireproof lodging house, which is a Class B multiple dwelling, is four stories and cellar in height, a brick building on a plot of ground fifty feet frontage and a depth of one hundred feet.

Eleventh. That although plaintiff received a copy of violations for the Department of Housing and Buildings with respect to its premises, it has refused and failed and still refuses and fails to comply with the order of the Commissioner of Housing and Buildings, a copy of which is attached herewith marked Exhibit "B."

Twelfth. That plaintiff admits the failure to make the necessary repairs and alterations at its premises pursuant to the provisions of the Multiple Dwelling Law and the order of the Commissioner of Housing and Buildings served upon it pursuant thereto.

Thirteenth. That plaintiff's premises are unsafe, improperly protected from fires and in general maintained [fol. 27] contrary to the provisions of the Multiple Dwelling Law as amended by Chapter 553 of the Laws of 1944.

As and for a Second, Separate and Affirmative Defense, Defendant further Alleges

Fourteenth. That plaintiff has an adequate remedy at law.

As and for a Third, Separate and Affirmative Defense, Defendant Further Alleges

Fifteenth. Repeats and realleges each and every allegation contained in the paragraphs of this answer numbered "Seventh," "Eighth," and "Ninth" with the same force and effect as if said allegations were herein specifically set forth at length.

Sixteenth. That the amendment of April 5, 1944, to Section 13 of the Multiple Dwelling Law, known as Chapter 553 of the Laws of 1944, entitled "An Act to amend the multiple dwelling law, in relation to fire protection in existing lodging houses," has a direct relationship to the public health, safety and welfare.

Wherefore, defendant demands judgment dismissing the complaint herein, with costs.

Ignatius M. Wilkinson, Corporation Counsel, Attorney for Defendant, Office & Post Office Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by William Wilson, on October 13, 1944.)

[fol. 28] EXHIBIT "A" TO ANSWER

Report of Temporary Commission to Examine and Revise the Tenement House Law

This Commission was appointed in May, 1927, under the authority of chapter 569 of the Laws of 1927. It organized promptly, worked intensively and reported to the Legislature January 31, 1928, at that time submitting its recommended revision of the Tenement House Law in the form of the "Dwellings Bill." This measure failed of passage. The Commission was continued, its personnel increased and its powers broadened pursuant to chapter 519 of the Laws of 1928. The new members appointed under that mandate were H. H. Murdock (New York), Hubert F. Breitwieser (Kings) and Leonard C. L. Smith (Queens). In replacement of Senator Charles J. Hewitt and former Assemblyman Emory W. Dyckman, Senator George L. Thompson (Suffolk) and Assemblyman Robert K. Story, Jr. (Kings) were respectively designated.

The Commission, so enlarged to 14 members, held its first meeting June 7, 1928, retained its then officers and counsel and established its program.

Between that date and the submission of this report the Commission or its committees held 57 meetings, heard 116 witnesses or consultants, and took 1,216 pages of testimony. One of these meetings were held in Buffalo and was attended by representatives of trade and civic bodies of that city. [fol. 29] Three meetings were held at the Bar Association of the City of New York and were attended by designated committees of architectural and engineering, chamber of commerce, real estate, and other civic and trade bodies. Three meetings were formal public hearings at City Hall in the City of New York. (These occurred in December, 1928, after a tentative draft of the Multiple Dwelling Bill had been before the public several weeks.) Four were in the nature of conferences with representatives of the city administration. The balance of the meetings were executive. The Commission has received a substantial number of briefs from trade, technical, civic, and welfare bodies and written suggestions from individuals and from anonymous sources.

The bill presented simultaneously with this report reflects the conclusions of this Commission in detail. A digest of the measure is appended hereto.

The general effect of the measure will be to improve light and air conditions in future homes in multiple dwellings, reduce the construction cost of rentable space, promote elasticity of design with incidental plan economy, and bring all kinds of multiple dwellings in residential areas under uniform height and bulk limitations.

Existing tenement houses built since 1901 and transient hotels are structurally unaffected by the proposed law.

As to so-called "old-law" tenement houses (built before 1901) the Commission's recommendations will measurably improve fire-safety and sanitation. In both respects, however, much, but by no means all, of the construction which antedated the present Tenement House Law will still be [fol. 30] substantially below modern standards. This result cannot be avoided without forcing the abandonment of many of the "old-law" tenement houses. This course was vigorously urged by several groups which requested the Commission to now fix a date in the future when the occupancy of the less habitable of such dwellings would be

unlawful. The inclusion of such a provision in the Multiple Dwellings Law is not considered practicable at this time. It is commonly stated that "old-law" tenement houses shelter about a third of the city's population. Certainly they shelter a substantial portion with the lowest earnings. The abandonment of the worst of such structures is extremely desirable, but that abandonment cannot be considered apart from the problem of providing other housing for their occupants. That problem is beyond the scope of this commission and the scope of a measure designed solely to set up housing standards. It should be noted in this connection that in 1927 the percentage of vacancies in old-law apartments overtook the percentage prevailing just before the housing shortage created by the war. This was about 7 per cent. Since 1927 the vacancy percentage has risen to about 10 per cent. South of Fourteenth Street, that part of the lower east side where it is generally supposed the least desirable "old-law" tenement houses are to be found, the percentage of vacancies in December, 1928, was nearly 14 per cent. These figures indicate that the tenants of such dwellings are bettering themselves as rapidly as their means and available housing facilities permit. It is believed that the proposed Multiple Dwellings Law will facilitate the building of multiple dwellings thereby [fol. 31] bringing proper accommodations within the reach of wage-earners; and in that respect aid in meeting the condition created by ancient, obsolete and undesirable housing now occupied by those within whose means no other or better facilities are available.

The Multiple Dwellings Law will make "old-law" tenement houses safer and more sanitary places in which to live, and will hold the owners to higher standards of cleanliness than under the present law.

The Commission has dealt with and endeavored to dispose of the apartment hotel problem. It recognizes that such structures have come in response to a demand for living conditions of the kind which the apartment hotel supplies. That demand may for the future be lawfully and safely met without jeopardy to the light and air of neighboring property. Existing buildings of that type have been centers of litigation for many months. Without being relieved of any violations of law or penalties accruing therefrom up to the effective date of the proposed Multiple Dwellings Law, the owners of apartment hotels

with cooking facilities would on and after that date be free of further violations upon compliance with requirements covering the safety of the cooking compartment which is the touchstone of their success and, at the same time, the source of their troubles.

The vexing problem of the converted dwelling—the one-time private home now serving as a multiple dwelling, often without reflecting structurally the fire protection and sanitation required by its increased occupancy—has, it is hoped, been settled under the formulae of the proposed law. These buildings provide inexpensive housing. They [fol. 32] range from the small boarding and rooming house to the fully equipped apartment house. Those in which cooking is known to occur have in some hundreds of instances complied with the Tenement House Law. Many thousands have not. Where cooking does not occur that law is not applicable. The local building code is. The extent to which this code has not been complied with is unknown. The problem has been to frame requirements which furnish better fire-protection and sanitation than the building code, less exacting than the Tenement House Law which is generally ignored, and at the same time keep the demands such that people of limited means can meet them. The Multiple Dwellings Law sets up readily attainable standards and should result in bringing into a status of legality (and comparative safety and cleanliness) large numbers of buildings now unlawfully occupied and, but for the proposed measure, without prospect of ever securing a bill of health from the enforcing department.

The Multiple Dwellings Law covers all types of multiple dwellings in the City of New York and such other communities as may wish to come under its operation. It does not interfere with the more restrictive provisions of any local zoning ordinance. It does not interfere with local administrative departments. Existing jurisdictional lines are undisturbed and may be freely changed by the municipality. In connection with departmental authority, however, the Commission has been forced to observe the virtual breakdown in the enforcement by city magistrates of the Tenement House Law. The practice of frequently adjourning cases involving violations, freely discharging or [fol. 33] suspending sentence, and of imposing negligible fines in the trifling number of cases in which any penalty whatever is imposed was noted in the earlier report of this

Commission and continued down to the December hearings where vigorous public protest was made. In an effort to relieve the magistrates' courts as far as possible of a responsibility with which they have been unsympathetic the Commission in the proposed law gives the enforcing department (primarily the tenement house department in the City of New York), power, when an owner refuses for twenty-one days to remedy a condition endangering human life or health, to make the required repairs at the expense of the owner of his property. Similar authority has for some years been vested in the health department and the superintendent of buildings. Neither has had occasion to exercise the authority for some time. Yet the violations of the Sanitary Code and of the Building Code are comparatively few and are adequately punished. It is anticipated that the existence of similar authority in the tenement house department will prompt landlords to correct violations more speedily and that with the decrease in number of court cases the magistrates will be disposed to hold offenders to stricter accountability. The twenty-one day period, however, merely marks the time within which repairs may not be made by the department. It does not affect the owner's criminal or civil liability for failure to immediately correct violations. This remains as in the present law.

The raising of the measure of population in the application section of the bill from 500,000 to 800,000 leaves Buffalo unaffected by the measure. The Consensus of opinion [fol. 34] in Buffalo was that under existing conditions the present Tenement House Law in its application to Buffalo required no change. The prevailing type of multiple dwelling in Buffalo rarely exceeds four stories and the standards of construction and plan, while better than required by the Tenement House Law, are not inconsistent with its provisions.

January 24, 1929.

James L. Whitley, Chairman; Samuel H. Hofstadter, Vice-Chairman; Lawson Purdy, Secretary; Benjamin Antin, Raymond B. Ingersoll, Leonard C. L. Smith, Edwin W. Wallace, Seabury C. Mastick, Hubert F. Breitwieser, H. H. Murdock, Darwin R. James, Robert K. Story, Jr., George L. Thompson.

EXHIBIT "B" TO ANSWER

Same as Exhibit I annexed to the complaint and printed at folios 18-23, herein.

[fols. 35-36] IN SUPREME COURT OF NEW YORK, SPECIAL TERM—PART III, NEW YORK COUNTY

OPINION OF THE COURT—October 27, 1944

Queenside Hills Realty Co., Inc., v. *Wilson*—Motion by defendant for judgment dismissing the complaint is granted. Order signed.

[fol. 37] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

File No. 17442—1944

QUEENSIDE HILLS REALTY CO. INC., Plaintiff-Appellant,

against

WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York, Defendant-Respondent

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please take notice that Queenside Hills Realty Co. Inc., the plaintiff, hereby appeals to the Court of Appeals from the judgment entered upon the decision of the Appellate Division of the Supreme Court for the First Department in the Office of the Clerk of the County of New York on the 9th day of April, 1945, affirming the judgment of the Special Term of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on December 19, 1944 dismissing the complaint herein, and that the plaintiff appeals from each and every part of said judgment, and from the whole thereof. This appeal is taken as of right upon the ground that there is directly involved [fols. 38-39] the construction of the constitution of the State of New York and the constitution of the United States.

Dated, New York, April 23, 1945.

Yours, etc., George G. Lake, Attorney for Plaintiff-Appellant, Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, New York City.

To Honorable Ignatius M. Wilkinson, Corporation Counsel, Attorney for Defendant-Respondent, Municipal Building, Borough of Manhattan, New York City. Honorable Archibald R. Watson, County Clerk of New York County.

[fol. 40] In Supreme Court of New York, County of New York

Queensside Hills Realty Co. Inc., Plaintiff-Appellant,

against

William Wilson, as Commissioner of Housing and Buildings of the City of New York, Defendant-Respondent

Judgment of Affirmance

The plaintiff-appellant having appealed to the Appellate Division of the Supreme Court, First Department, from the order entered herein in the office of the Clerk of the County of New York on or about the 27th day of October 1944 and from the order entered in the office of the said Clerk on or about the 12th day of December 1944 resettling the aforesaid order entered on the 27th day of October 1944 granting [fol. 41] defendant-respondent's motion to dismiss the complaint and from the judgment entered thereon in the office of the said Clerk on or about the 19th day of December 1944, and the appeal having been duly argued at the said Appellate Division, and that Court in an order dated the 29th day of March 1945 having unanimously ordered and adjudged that the order and judgment so appealed from be in all things affirmed, and that the defendant-respondent recover of the plaintiff-appellant the costs of the appeal, and a certified copy of the said Appellate Division order having been duly filed in the office of the Clerk of the County of New York, and the costs of the defendant-respondent having been duly taxed at the sum of $91.90,

Now on motion of Ignatius M. Wilkinson, Corporation Counsel, attorney for defendant-respondent, it is

Adjudged that the orders and judgment so appealed from be and the same hereby are unanimously affirmed, and it is further

Adjudged that the defendant-respondent William Wilson, as Commissioner of Housing and Buildings of the City of

New York (Municipal Building, Manhattan, N. Y. C.) recover of the plaintiff-appellant Queenside Hills Realty Co. Inc. (312-14 Bowery, Manhattan, N. Y. C.) the sum of $91.90 costs as taxed, and that the defendant-respondent have execution therefor.

Dated, April 9, 1945.

Archibald R. Watson, Clerk.

[fols. 42-43] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

George G. Lake, being duly sworn, deposes and says:

I am the attorney for the plaintiff-appellant herein and am fully familiar with all the facts of the appeals herein. No opinion was rendered by the Appellate Division in the First Department in affirming Special Term herein.

George G. Lake.

Sworn to before me this 25th day of April, 1945. Bella Klein, Notary Public, Kings County. Certificate filed N. Y. County. Comm. Expires March 30, 1946.

[fol. 44] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of July in the year of our Lord one thousand nine hundred and forty-five, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Senior Associate Judge, Presiding; John Ludden, Clerk.

QUEENSIDE HILLS REALTY CO., INC., Appellant,
ag'st
WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York, Respondent

REMITTITUR—July 19, 1945

Be is Remembered. That on the 29th day of May in the year of our Lord one thousand nine hundred and forty-

five, Queenside Hills Realty Co. Inc., the Appellant—in this cause, came here unto the Court of Appeals, by George G. Lake its attorney—and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department,

And William Wilson, as Commissioner of Housing and Buildings of the City of New York, the respondent in the said cause, afterwards appeared in the said Court of Appeals by Ignatius M. Wilkinson his attorney,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed,

Whereupon, The said Court of Appeals having heard this Cause argued by Mr. George G. Lake of Counsel for the [fol. 45] Appellant, and by Mr. Francis A. Fallan Jr. of Counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with Costs.

And it was also further ordered that the records aforesaid and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to Law.

And afterwards, to wit, on the 25th day of October, 1945 an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said judgment be affirmed, with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justice thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 46] Court of Appeals,
Clerk's Office, Albany

July 19, 1945.

I hereby certify, that the proceeding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk.

[fol. 47] In the Court of Appeals of New York

Present Hon. John T. Loughran, Chief Judge, Presiding.

Queenside Hills Realty Co., Inc., Appellant,

vs.

William Wilson, as Commissioner, etc., Respondent

Order Amending Remittitur—October 25, 1945

A motion for the reargument and to amend the remittitur in the above cause having heretofore been made herein upon the part of the Appellant, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the motion for reargument be and the same hereby is denied with ten dollars costs and necessary printing disbursements and the remittitur amended by adding thereto the following:

A question under the Constitution of the United States was presented and necessarily passed upon. The Appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944 as applied to Appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4 of the laws of the State of New York, 1944, as applied to Appellant, is not violative of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States.

And the Supreme Court, County of New York is hereby requested to direct the Clerk to return said remittitur to this Court for amendment accordingly.

A copy.

Raymond J. Cannon, Deputy Clerk.

[fol. 48] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

Upon reading the petition of Queenside Hills Realty Co. Inc., a New York corporation, the plaintiff-appellant herein praying for the issuance of an order herein allowing its appeal to the Supreme Court of the United States from a final judgment upon reargument of the Court of Appeals of the State of New York, and it appearing that in said final judgment of this court, a question under the Constitution of the United States was presented and necessarily passed upon; that the appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States, and that this Court held that Chapter 553, Section 4, of the laws of the Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, was not violative of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States, and it further appearing from said petition that such petition is a proper petition for the issuance of this order,

Now, Therefore, it is ordered by the undersigned, the Chief Judge of the Court of Appeals of the State of New [fol. 49] *New* York, that said appeal to the Supreme Court, of the United States from said final judgment of this court lie, and the same is hereby allowed, and it is further

Ordered, that the plaintiff-appellant, Queenside Hills Realty Co. Inc., execute to William Wilson as Commissioner of Housing and Buildings of the City of New York, defendant-respondent-appellee, its bond with surety to be approved by the undersigned in the sum of $250.00 conditioned according to law, and it is further

Ordered, that the Clerk of the Supreme Court of the State of New York, County of New York, who is possessed of the record herein, and with whom such record is filed in accordance with the laws of the State of New York within forty days after this date, make and transmit to the Clerk of the United States Supreme Court, a transcript of the record herein containing a true copy of all material parts

of the record herein, which shall be designated by praecipe filed with him by either of the parties hereto, or stipulated by said parties according to law, and it is further

Ordered, that this order and all further proceedings herein be filed in the Office of the Supreme Court of the State of New York, County of New York.

John T. Loughran, Chief Judge of the Court of Appeals.

[fol. 50] In Court of Appeals of New York

[Title omitted]

Petition for Allowance of Appeal to the United States Supreme Court

To the Chief Judge of the Court of Appeals of the State of New York:

Queenside Hills Realty Co. Inc., the plaintiff-appellant in this action, a corporation of the State of New York, respectfully shows:

1. Petitioner is the appellant in this action.

2. The appeal in this case was from a judgment of the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, affirming a judgment of the Special Term of the Supreme Court, New York County, dismissing the complaint herein on motion in an action for an injunction and a declaratory judgment, declaring unconstitutional and void so much of the provisions of Chapter 553 of the Laws of 1944 as affected a building owned by plaintiff, located at 312 and 314 Bowery, Borough of Manhattan, City and State of New York. Said building was and still is conducted as a lodging house, and was erected in 1940.

3. On July 19, 1945, this court unanimously affirmed said Appellate Division without opinion. A judgment to that effect was entered in the office of the Clerk of the County of New York, who is likewise the Clerk of the Supreme Court of the State of New York, County of New York on July 27, 1945. Thereafter, and on October 15, 1945, plaintiff-appellant moved this court for reargument of said appeal

and judgment, and likewise to amend the remittitur by [fol. 51] certifying that a question under the Constitution of the United States was presented and necessarily passed upon. By its judgment dated October 25, 1945, this court denied the motion for a reargument, but amended the remittitur by adding the following:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is not violative of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States."

Said judgment further provided that the Supreme Court, County of New York, was requested to direct its Clerk to return said remittitur for amendment accordingly. On November 2, 1945, an order was entered in the Supreme Court, New York County, making said order of the Court of Appeals the order of the Supreme Court, New York County. Said remittitur has since been remitted to the Clerk of this Court and amended accordingly.

4. That the record of all proceedings in this court and in the courts below is, in accordance with the practice in this State, filed in the office of the Clerk of the Supreme Court of the State of New York, County of New York, and that said Clerk is the Clerk of the Court possessed of the record as prescribed by the Rules of the United States Supreme Court.

5. That there is error in the final judgment of this court, denying the reargument herein, whereby petitioner is aggrieved and that as appears by paragraph 3, a question under the Constitution of the United States was presented and necessarily passed upon. That in accordance with the provisions of Subdivision (a) of Section 344 of Title 28 of the United States Code (which is Section 237 of the Judicial Code), petitioner desires to appeal to the Supreme Court of the United States from said final judgment upon reargu-

[fol. 52] ment herein, and petitioner consequently prays for the allowance of such appeal. Petitioner has annexed hereto and hereby respectfully incorporates its assignment of errors, and respectfully prays that for such errors the said judgment of the Court of Appeals of the State of New York, dated October 25, 1945, be reversed and a judgment ordered in favor of petitioner, the plaintiff-appellant herein, and for costs.

No previous application for this relief has been made to any court or judge.

Queenside Hills Realty Co., Inc., Petitioner, by George G. Lake, Attorney.

George G. Lake, Attorney for Plaintiff-Appellant, Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, New York 17, N. Y.

Duly sworn to by George G. Lake. Jurat omitted in printing.

[fol. 53] In Court of Appeals of New York

[Title omitted]

Assignment of Errors

Comes now Queenside Hills Realty Co. Inc., plaintiff appellant above named, and as appellant to the Supreme Court of the United States from the final judgment and decision herein as per remittitur of this court, dated October 25, 1945, assigns as error:

1. That the Court of Appeals of the State of New York erred in refusing to grant a reargument of its final judgment herein and erred in refusing upon such reargument to reverse the judgment of the Appellate Division of the Supreme Court for the First Judicial Department for the State of New York, affirming a judgment of the Supreme Court of the State of New York, County of New York, dismissing the complaint herein upon motion of defendant-respondent-appellee.

2. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States.

3. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that said law is discriminatory as [fol. 54] applied to the building owned and operated by plaintiff-appellant.

4. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that said provision of law requires an expenditure which is unreasonable and confiscatory as applied to the building owned and operated by plaintiff-appellant.

5. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that the effect of said statute is to make the date of April 5, 1944 the determining factor of whether or not said statute applies to the building of plaintiff and those similarly situated, and that said date bears no reasonable connection to the matters to which said legislation was directed.

6. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that said provision of law is without the police power of the State of New York.

7. That the Court of Appeals of the State of New York erred in holding that Section 4 of Chapter 553 of the Laws of New York of 1944 does not violate Section 1 of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that said provision of Law establishes an improper and unjustifiable classification.

8. That the Court of Appeals of the State of New York erred in holding that the complaint of plaintiff appellant in this cause was legally insufficient.

[fol. 55] 9. That the Court of Appeals of the State of New York erred in holding that defendant was entitled to a judgment dismissing the complaint on motion.

10. That the Court of Appeals of the State of New York erred in holding that plaintiff was not entitled to a trial and to the introduction of proof.

For which errors Queenside Hills Realty Co. Inc., a New York Corporation, the plaintiff-appellant above named, prays that the said final judgment on reargument of the Court of Appeals of the State of New York as per its remittitur dated October 25, 1945, in the above entitled cause, be reversed, and that a judgment ordered in favor of the said plaintiff-appellant and for costs.

George G. Lake, Attorney for Plaintiff-Appellant. Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, New York City.

[fols. 56-67] Citation in usual form showing service on Ignatius M. Wilkinson omitted in printing.

[fol. 66] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 67-69] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON—Filed January 29, 1946

SIRS:

Please take notice that the points upon which appellant intends to rely, are those set forth in the assignment of errors.

Dated: New York, January 28, 1946.

Yours, etc., George G. Lake, Attorney for Appellant Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, New York City.

To: Hon. John J. Bennett, Jr., Corporation Counsel of the City of New York, Attorney for Appellee, Municipal Building, New York, N. Y. Hon. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Washington 13, D. C.

[fol. 70] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed January 29, 1946

SIRS:

Please take notice that pursuant to Subdivision 9 of Rule XIII of the Rules of this Court, the appellant hereby designates the following parts of the record to be printed:

1. The papers on appeal in the Court of Appeals of the State of New York, except that the following is to be omitted in printing:

(a). Notice of appeal from original order (folio 19).
(b). Original order appealed from (folio 22).
(c). Stipulation waiving certification (folio 104).
(d). Order of affirmance of Appellate Division (folio 115).
(e). Stipulation waiving certification (folio 127).

2. Remittitur of Court of Appeals, including amendment dated October 25, 1945.

3. Order of Chief Judge Loughran dated December 8, 1945 allowing appeal and petition for order allowing said appeal.

4. Assignment of errors.

5. Citation.

6. Statement of points to be relied on.

Dated: New York, January 28, 1946.

Yours, etc., George G. Lake, Attorney for Appellant Office & P. O. Address, 60 East 42nd Street, Borough of Manhattan, New York City.

[fols. 71-72] To: Hon. John J. Bennett, Jr., Corporation Counsel of the City of New York, Attorney for Appellee, Municipal Building, New York, N. Y. Hon. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Washington 13, D. C.

[fol. 73] [File endorsement omitted.]

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—February 11, 1946

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Mr. Justice Jackson took no part in the consideration of this question.

[Endorsed on cover:] File No. 50,472. New York, Court of Appeals, Term No. 769. Queenside Hills Realty Co., Inc., Appellant, vs. William Wilson, as Commissioner of Housing and Buildings of the City of New York. Filed January 22, 1946. Term No. 769 O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 22 1946
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Appellant,

vs.

WILLIAM WILSON, as Commissioner of Housing and Buildings of the City of New York.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

George G. Lake,
Counsel for Appellant.

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COURT OF APPEALS OF THE STATE OF NEW YORK

OCTOBER TERM. 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Plaintiff-Appellant.

vs.

WILLIAM WILSON, AS COMMISSIONER OF HOUSING AND BUILDINGS OF THE CITY OF NEW YORK,
Defendant-Respondent-Appellee.

STATEMENT AS TO JURISDICTION PURSUANT TO RULE XII OF THE RULES OF THE UNITED STATES SUPREME COURT.

This is an appeal from a final judgment upon reargument of the Court of Appeals of the State of New York, which is the highest Court of the State of New York, in a case in which there was drawn in question the validity of a statute of the State of New York, which was attacked on the ground of its being repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States.

This action was originally started in the Supreme Court of the State of New York, County of New York. In the State of New York, the Supreme Court is the Court of first instance. Appeals from the Supreme Court are taken to the Appellate Division of the Supreme Court and thereafter to the Court of Appeals of the State of New York. The

purpose of the present action was to enjoin defendant, as Commissioner of Housing and Building of the City of New York, from putting into effect Section 4 of Chapter 553 of the 1944 Laws of New York, insofar as said statute was sought to be applied to plaintiff's building. The complaint likewise asks for a declaratory judgment declaring said statute unconstitutional.

After issue was joined by service of an answer, defendant moved for judgment on the pleadings. This motion was granted, and a judgment was entered dismissing the complaint on motion, and without any proof having been taken. Plaintiff thereafter appealed to the Appellate Division of the Supreme Court for the First Judicial Department which likewise unanimously affirmed without opinion (269 A. D. 691). Plaintiff thereafter appealed to the Court of Appeals of the State of New York which likewise affirmed without opinion (294 N. Y. 917).

Plaintiff thereafter, and on October 15, 1945 moved the Court of Appeals of the State of New York for reargument, and if the same be denied, then for a certificate to the effect that a question under the United States Constitution was presented and passed upon. By its final judgment dated October 25, 1945, the Court of Appeals of the State of New York denied the application for a reargument but amended its prior judgment and remittitur by adding thereto the following:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is not violative

of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States."

Statutory Provision as to Jurisdiction

This appeal is taken under Section 344 of Title 28 of the United States Code, which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision in favor of its validity, may be reviewed by the Supreme Court of the United States upon appeal.

Statute of the State Involved

The statute of the State involved is Section 4 of Chapter 553 of the New York laws of 1944. The statute went into effect on April 5, 1944. The statute reads in part as follows:

> "Lodging houses of non-fire proof construction existing prior to the enactment of this subdivision, shall comply with the following conditions:"

The conditions themselves are fully set forth in the papers on appeal herein at pages 19 at folios 55 to 69 inclusive, of the papers on appeal. The pertinent provisions of said section are to the effect that certain wood work be removed; that the entire building be provided with an automatic wet pipe sprinkler system; that the entrance halls be fire retarded; that all doors opening on the entrance halls be self-closing fire proof doors; that the cellar ceiling be fire retarded; that wood partitions be removed or protected with incombustible material; that main aisles be three feet in width; that exit signs be put up; that there be a scuttle or bulkhead at the top story; that two remote means of

egress be provided; that all openings have automatic self-closing fire proof doors; that a completely enclosed room be used for storage with fire resistive partitions; that metal containers be provided with self-closing lids for garbage; that ceiling and floors adjoining any furnace be fire retarded; that no insecticide be stored without a permit from the fire department; that the top of every cubicle shall be at least two feet from the ceiling and that all parts of every lodging house shall be inspected by a clerk or a watchman every two hours.

Most of the above statute does not apply to plaintiff's building, which at the time of its construction was already built in accordance with these directions. The important provision which does apply to plaintiff's building is that providing for the installation of a wet pipe sprinkler system for the entire building.

Date of Judgment or Decree Sought to Be Reviewed

The date of the final judgment of the Court of Appeals of the State of New York sought to be reviewed is October 25, 1945. The date upon which the application for appeal is presented to the Chief Judge of the Court of Appeals of the State of New York is December 8th, 1945.

Opinions Delivered in Courts Below

No opinion was ever delivered by any Court below in acting upon the present case or any appeal therein.

Substantiality of Questions Involved

The folio numbers hereafter given are folio numbers of the papers on appeal before the Court of Appeals of the State of New York. The complaint herein alleged that plaintiff was the owner and operator of a lodging house known as Clover Hotel, located at 312-314 Bowery, Bor-

ough of Manhattan, City and State of New York. This was a four story brick building erected in 1940, having a frontage of approximately fifty feet and a depth of one hundred feet. A certificate of occupancy for the building was issued by the City of New York on January 15, 1941. The building was built in accordance with the latest and most improved methods of construction and was in every respect safe and proper for occupancy as a lodging house. The building contains only open dormitories and has no cubicles. The first tier of beams is fireproof; the building is equipped with an open circuit fire alarm system throughout the building; a completely enclosed fireproof stair exit; and a fire escape as well as a fireproof passage way from the rear yard to the street; and the building has constant watchman service. The complaint further set forth that there were many inferior lodging houses prior to 1929. In 1927, the Legislature of the State of New York appointed a Commission which thereafter reported to the Legislature.

In 1929, Chapter 713 of the Laws of New York was adopted, which is known as the Multiple Dwelling Law. This law laid down certain stringent regulations for the construction of buildings and for safety measures. All houses built since 1929 including plaintiff's building, are in every respect proper; comply with the stringent regulations of law, and do not constitute a fire hazard. There have in fact never been any fires or loss of life, in plaintiff's building or those similar to it.

In 1944, Chapter 553 of the Laws of 1944 was adopted which by its terms directed certain expensive alterations in all lodging houses existing at the time that the Chapter was adopted. This law made no effort to distinguish between the old fire hazard buildings, known as "flop houses," and plaintiff's present modern building, nor did the law, which went into effect on April 5, 1944 make any similar

provisions for inferior existing buildings thereafter to be converted to lodging houses (which could be done under the law simply by filing plans), or identical lodging houses thereafter to be built.

The complaint at folio 41 alleged that there had been no change in method of building construction or safety measures since 1929, and further alleged that plaintiff's building was worth approximately $25,000; that the cost of complying with the applicable part of the law would be approximately $7,500, and that any possible benefit obtained would be negligible, and completely unreasonable and confiscatory with reference to the benefit to be obtained. The complaint therefore at folio 45 stated that the law as applied to plaintiff's building, was unconstitutional and void by reason of the fact that the same was discriminatory, unreasonable and confiscatory. At folio 49, judgment was therefore asked declaring the law null and void insofar as it applied to plaintiff's building and buildings similarly situated, and enjoining the defendant from attempting to apply the law to plaintiff's building and buildings similarly situated. The question under the Constitution of the United States was therefore raised directly in the complaint. Under the law of the State of New York, pleadings are to be liberally construed. Section 275 of the New York Civil Practice Act, provides as follows:

> "*Construction of pleadings.* Pleadings must be liberally construed with a view to substantial justice between the parties."

Defendant filed its answer in the Supreme Court of the State of New York, and applied for judgment on the pleadings, dismissing the complaint on motion. The law of the State of New York with reference to such motion is set forth in the case of

Loewinthan v. *Beth David Hospital et al.*, 9 N. Y. S. 2nd 367 at page 369.

"On a motion for judgment on the pleadings, just as on a motion to dismiss a complaint before answer for insufficiency, every intendment and fair inference must be attributed to the allegations of the complaint (Dyer v. Broadway Central Bank, 252 N. Y. 430, 432, 169 N. E. 635; Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N. Y. S. 184; Moore v. Bonbright & Co., Inc., 202 App. Div. 281, 195 N. Y. S. 854) to determine whether a cause of action may be spelled out."

The Court below granted judgment on the pleadings and dismissed the complaint. Judgment to that effect was entered (folios 7-9). An appeal was taken to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department, where the same questions were raised (folios 4-6). The Appellate Division affirmed unanimously (folios 120-123). An appeal was taken to the Court of Appeals (folios 109-114). In the Court of Appeals, appellant's brief contained the following statement at page 5:

"In the present buildings, the walls, stairs, stair enclosures and the first tier of beams are fireproof. The upper tiers are not fireproof, but have a fire resistance of approximately one hour. That is the only essential structural difference between this building and a fireproof building. This building is in all respects similar to the fine six-story apartment houses, such as are found on the Grand Concourse, in the Borough of the Bronx, or on Ocean Avenue, in Brooklyn.

As a matter of fact the present building already complies with most of the provisions of Section 353 of the Laws of 1944 (43).

It is alleged in the complaint that no fire has occurred in any lodging house built since 1929 in which there was any loss of life (41), and a check-up shows that no fire of any kind has ever occurred in these buildings."

The brief further pointed out at page 6 concerning the invalidity of the statute:

> "It is respectfully submitted that the statute in question is void under the above provision, by reason of the fact that while certain expensive installations are required by the statute to be made in existing buildings, there is no similar provision for identical buildings thereafter to be built or converted."

The motion for a reargument before the Court of Appeals contained the following points:

> "The statute is unconstitutionally discriminatory."
> "The statute is unconstitutionally confiscatory and unreasonable, as applied to plaintiff's lodging house."
> "The issues of whether the classification is proper and reasonable and of whether the statute is confiscatory are matters on which plaintiff should be given an opportunity to present the evidence at a trial, and should not have been decided summarily upon defendant's motion to dismiss the complaint."

The Court of Appeals of the State of New York has further certified that a question under the Constitution of the United States was presented and necessarily passed upon, and that the decision was in favor of the validity of the statute.

It would be well to consider the factual situation concerning lodging houses in the City of New York. Practically all of these are centralized upon a street famed in song and story known as The Bowery, and practically all of these lodging houses extend over the Bowery for a distance of approximately one mile beginning at Chatham Square. There are practically no empty lots within this district, and while it is occasionally possible to buy lots and erect a new building, as plaintiff did, most lodging houses which will hereafter come into being would be as a result of the con-

version of existing buildings, not formerly lodging houses. These are mostly old buildings, which are not fireproof or fire resistant. They may neyertheless be converted to lodging houses under Section 8 of the Multiple Dwelling Law of the State of New York, which provides in part as follows:

> "A building not a dwelling if hereafter converted or altered to a multiple dwelling shall thereupon become subject to all the provisions of this chapter relative to dwellings of like class and kind hereafter erected."

However, a hereafter erected building, would not be a building which was a lodging house existing prior to the enactment of Chapter 553 of the Laws of 1944, and would not therefore be subject to the provisions of the statute attacked. The practical result of this statute is consequently to permit any person who desires to compete with plaintiff to erect or convert a building immediately adjacent to plaintiff, which building would not have to comply with Chapter 553 of the Laws of 1944, and which building would not therefore have the safety measures required by that statute and in particular, would not require the owner of the converted building to expend 37½% of the value of the building upon a sprinkler system. The injustice of the statute is therefore manifest.

The Multiple Dwelling Law deals with old law tenament houses built prior to 1901; new law tenament houses built subsequent to 1901 and prior to 1929; converted dwellings; and with houses hereafter to be erected, which are houses built subsequent to 1929 and thereafter. Each one of these classes of houses falls into a separate category under the Multiple Dwelling Law, and requirements vary in each case. There is no attempt under the Multiple Dwelling Law itself to lump all these houses together, and there has been no general legislation concerning multiple dwellings since the enactment of the Multiple Dwelling Law in 1929.

The brief upon reargument before the Court of Appeals of the State of New York, pointed out that the statute was discriminatory because it enabled persons similarly situated; namely, persons who might purchase old buildings adjacent to plaintiff or erect new buildings, to build buildings similar to that of plaintiff, without the necessity of complying with the onerous provisions of Chapter 553 of the Laws of 1944. Such a distinction can be sustained only in the presence of special circumstances as in

Tigner v. *Texas*, 310 U. S. 141,

but is otherwise invalid.

Fisher v. *Borough Council of Borough of South Toms River*, 13 New Jersey Miscellaneous 852, 181 Atlantic 630;

Michigan Lake Building Corporation v. *Hamilton*, 340 Ill. 284, 172 Northeastern 710;

Dowsey v. *Village of Kensington*, 257 N. Y. 221;

City of Vincennes, Ind. v. *Marland Refining Co.*, 33 Fed. 2nd 427.

This general rule is well set forth in the case of

Cowan v. *City of Buffalo*, 247 A. D. 591, 288 N. Y. S. 239,

as follows:

> "A statute or ordinance which amounts to a denial of the equal protection of the law to persons within the jurisdiction of the lawmaking body must be deemed unconstitutional and void, even if it is passed under the guise of the police power. Dobbins v. Los Angeles, 195 U. S. 233, 237, 25 S. Ct. 18, 49 L. Ed. 169; Gibbons v. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, 626, 18 S. Ct. 488, 42 L. Ed. 878; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243."

A statute of the character of the present must be construed on the basis of what may be done, and not what has been done.

Riglander v. *Star Company*, 98 A. D. 101 at page 108, 90 N. Y. S. 772;

People v. *Simonian*, 173 Misc. 131, 18 N. Y. S. 2nd 371.

The conclusion is inescapable that the actual effect of the statute attacked was as if it read that all buildings used as lodging houses on April 5, 1944, have to put in an automatic wet pipe sprinkler system, while all other existing buildings which might thereafter be converted to lodging houses, and indeed might be the next day, need not, even though actually inferior in construction. The effect of this is to make the date of April 5, 1944 the determining factor as to whether the statute need or need not be complied with, and this date bears no relation whatsoever to the condition attacked. Such enactment is unconstitutional.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266 at page 274.

The complaint in the present action likewise alleged that the statute attacked was confiscatory as applied to plaintiff's building. The complaint alleged and the briefs argued that there was no necessity however for the legislation, and that to comply with the legislation would cost $7,500 in a building worth $25,000, without any appreciable benefit or necessity. The New York Law on this subject was reviewed in the case of

Adamec v. *Post*, 273 N. Y. 250 at page 256,

as follows:

"Even so, as the court pointed out in Health Department of City of New York v. Rector, etc., of Trinity Church, supra, 145 N. Y. 32, at page 41, 39 N. E. 833, 836, 27 L. R. A. 710, 45 Am. St. Rep. 579, the discretion

of the Legislature is not absolute. "The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public." In the same case the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, a L. R. A. 81, 12 Am. St. Rep. 560: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain."

The same rule as set forth above concerning the large expense and small benefit, was laid down by the United States Supreme Court in an opinion by Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

The *Pennsylvania Coal Co.* case is likewise appropriate by reason of another question in this appeal. There are about two hundred lodging houses in New York City, which were in existence in 1929, when the Multiple Dwelling Law was adopted. As to these lodging houses, no question has been raised as to the constitutionality of the statute attacked. The attack as to the constitutionality applies only to a half-dozen or so lodging houses built since 1929, which are constructed pursuant to entirely different laws, and whose construction is wholly superior and dissimilar. However, the fact that only a small number of houses is involved,

was not thought to be an objection by Mr. Justice Holmes, in the *Pennsylvania Coal Co.* case, in which only one house was involved.

It is further the rule that if some special circumstances be claimed justifying the distinction between existing buildings and existing buildings not then used as lodging houses but which might thereafter be converted to lodging houses, such reason should be shown at a trial, and not merely on a motion to dismiss the complaint,

Barden's Farm Products Company, Inc. v. *Baldwin*, 293 U. S. 194.

In prior New York cases where a statute has been attacked as confiscatory, the courts have invariably granted a hearing, and not simply disposed of the case on motion.

Cockroft v. *Mitchell*, 187 A. D. 189, Affirmed without opinion, 230 N. Y. 630;

Health Department v. *Rector*, 145 N. Y. 43;

Tenement House Department v. *Moeschen*, 179 N. Y. 325, 203 U. S. 383.

As we have pointed out, the small building involved is practically fireproof; has ample means of egress; has a permanent fire alarm system and constant watchman service; and has no cubicles, which have been a fire danger. No automatic wet pipe sprinkler system, costing a large and confiscatory sum is necessary in this or similar buildings, whatever the case may be as to old buildings.

From the above, it is respectfully submitted that the questions involved in this appeal of discrimination and confiscation are substantial.

Respectfully submitted,

GEORGE G. LAKE,
Counsel for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,

Appellant,

AGAINST

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLANT'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,

Appellant,

against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLANT'S BRIEF.

Statement of Proceedings Below.

This action was originally commenced in the Supreme Court of the State of New York, County of New York, which is a court of first instance. The Supreme Court of the State of New York, County of New York, dismissed the complaint on motion of the appellee. Such decision is not officially reported, but appeared in the New York Law Journal of October 27, 1944. Appeal was thereafter taken to the Appellate Division of the Supreme Court of the State of New York, which unanimously affirmed without opinion (261 A. D. 691). Appellant thereafter appealed to the Court of Appeals of the State of New York, which, is the Court of last resort, and which likewise affirmed without opinion (294 N. Y. 917). Appellant thereafter moved the Court of Appeals of the State of New York for reargument and for a certification that a question under the United States Constitution was presented and passed upon. The Court of Appeals denied the application for a reargument, but amended the prior judgment by certifying that a question under the Constitution of the United States was presented and necessarily passed upon (295 N. Y. 567, Record, page 26).

William Wilson, as Commissioner of Housing and Buildings of the City of New York was the original appellee. He resigned during the pendency of this appeal, and his successor, T. Newton Saxl, was substituted as appellee.

Jurisdiction.

This appeal is taken under Section 344 of Title 28 of the United States Code, which is likewise Section 237 of the Judicial Code. This section provides that a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution of the United States, and the decision in favor of its validity, may be reviewed by the Supreme Court of the United States upon appeal.

The Court of Appeals of the State of New York (295 N. Y. 567) amended the final judgment herein by adding the following certification:

> "A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is violative of, and repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States. This Court held that Chapter 553, Section 4, of the laws of the State of New York of 1944, as applied to appellant, is not violative of, or repugnant to, Section 1 of the Fourteenth Amendment of the Constitution of the United States."

This Court on February 11, 1946, noted probable jurisdiction, and transferred this case to the summary docket (Record, page 34).

Statement of the Case.

Since this case involves multiple dwellings within the City of New York, a brief history of legislation affecting them is proper at the outset. While there are some early regulatory statutes in the State of New York, the general question of prescribing standards for tenement houses in the City of New York was first acted upon by the New York State Legislature in Chapter 334 of the Laws of 1901. Consequently, tenement houses built prior to 1901 are generally known as old law tenements, while tenement houses built subsequent to 1901 and prior to the adoption of the Multiple Dwelling Law, are called new law tenements. The Multiple Dwelling Law is Chapter 713 of the New York Laws of 1929. It resulted from the report of a Commission to revise the Tenement House Law, which report is set forth at pages 17 to 21 of the Record.

Lodging houses in the City of New York were not covered by the Multiple Dwelling Law, but were regulated by the Charter of the City of New York (Record, page 7). Lodging houses were brought under the Multiple Dwelling Law upon its enactment in 1929.

It may be said at this point that the purpose of the adoption of the Multiple Dwelling Law was not only to regulate future construction, but to legalize the conversion of private dwellings to multiple dwellings and likewise to legalize what were known as cooking alcoves in hotels. Under the Tenement House Law, a building was not considered a tenement house unless cooking was done therein. This distinction has been abolished by the Multiple Dwelling Law, but conditions were laid down for the legalization of cooking alcoves. The Multiple Dwelling Law itself recognized the cleavage between existing buildings used as multiple dwellings; existing buildings not multiple dwellings, but which might thereafter be converted to multiple dwellings; and multiple dwellings thereafter to be built. Section 8 of the Multiple Dwelling Law provides as follows:

> "A building not a dwelling if hereafter converted or altered to a multiple dwelling shall thereupon become subject to all the provisions of this chapter relative to dwellings of like class and kind hereafter erected."

The above provision is important, because the legislation attacked on this appeal made provision for existing buildings used as multiple dwellings, but made no provision for inferior buildings not used as multiple dwellings, but which thereafter might be converted to multiple dwellings.

The Multiple Dwelling Law itself laid down stringent rules for new construction in the matter of safety, ventilation and facilities. The building involved in the present appeal was constructed in 1940 (Record, page 6) and is representative of approximately ten buildings similarly situated.

The building itself is a four-story brick building, containing open dormitories on each floor, and is described as follows in the Statement as to Jurisdiction, on page 7:

> In the present buildings, the walls, stairs, stair enclosures and the first tier of beams are fireproof. The upper tiers are not fireproof, but have a fire resistance of approximately one hour. That is the only essential structural difference between this building and a fireproof building. This building is in all respects similar to the fine six-story apartment houses, such as are found on the Grand Concourse, in the Borough of the Bronx, or on Ocean Avenue in Brooklyn.

> It is alleged in the complaint that no fire has occurred in any lodging house built since 1929 in which there was any loss of life; and a check-up shows that no fire of any kind has ever occurred in these buildings.

It may be well at this point to summarize the situation concerning existing lodging houses in the City of New York. Most of them are located at the lower end of The Bowery in the Borough of Manhattan. Most of them are old buildings. Needless to say, there are practically no open lots on the Bowery, so that whoever desires to build a new lodging house would ordinarily take a business building and convert it to a lodging house by complying with the requirements for hereafter erected buildings. Only in the case of the appellant's building and a few others have new buildings been built since 1929. Needless to say, a business building built prior to 1929, but thereafter converted to a lodging house, would be far inferior to appellant's building in the matter of safety, ventilation and facilities.

The legislation which appellant attacks as unconstitutional is Section 4 of Chapter 553 of the laws of 1944. This Section, which went into effect on April 5, 1944, reads as follows:

> "Lodging houses of non-fireproof construction, existing prior to the enactment of this subdivision shall comply with the following conditions:"

The conditions themselves are set forth in the Instructions annexed to Exhibit 1 annexed to the complaint, which Instructions appear at pages 11 to 14 of the Record. The complaint alleges that practically all of the directed alterations are inapplicable to appellant's building (complaint, paragraph 20, at page 8 of the Record), but the important provision which is applicable is Subdivision (d) appearing at pages 11 and 12 of the record which is as follows:

> "(d) The entire buildings shall be provided with an automatic wet pipe sprinkler system. In connection with such system there shall be an automatic closed circuit fire alarm system so arranged and in-

stalled as to give warning at a recognized central station approved by the Fire Department. Such sprinkler and alarm systems shall have supervisory and maintenance service."

It is alleged in the complaint that the installation of such a sprinkler system would cost $7500 in a building worth approximately $25,000 (paragraph 22 of the complaint, page 8 of the Record); that the benefit to be obtained by such installation is negligible (paragraph 22 of the complaint, page 8 of the Record); and that the building as it exists is of the latest and most approved construction and is in every respect safe and proper for occupancy as a lodging house (paragraphs 6 and 7 of the complaint, page 6 of the Record). The legislation is therefore attacked as unconstitutional in paragraph 24 of the complaint by reason of the fact that the same is discriminatory and confiscatory (paragraph 24 of the complaint, pages 8 and 9 of the Record).

Specification of Errors.

The judgment in the Courts below is predicated upon a motion of appellee to dismiss the complaint as insufficient in law. Appellant is consequently entitled to every fair intendment of the complaint. The assigned errors urged upon this appeal are therefore as follows:

1. Assignment of error No. 3, attacking the legislation as discriminatory (Record, page 31).

2. Assignment of error No. 4, attacking the legislation as confiscatory (Record, page 31).

3. Assignment of error No. 7, attacking the legislation on the ground of unreasonable classification (Record, page 31).

4. Assignment of error No. 8, submitting that it was an

error to dismiss appellant's complaint on motion (Record, page 31).

The other assignments of error are subsidiary to the above four points.

Summary of Argument.

The following is a summary of the argument to be presented by the appellant:

1. Since the judgment of the Court below is based on a motion of appellee and not on proof, appellant is entitled to every fair intendment of the complaint, and the complaint is legally sufficient.

2. The legislation attacked is discriminatory, because it provides for the installation of an automatic wet pipe sprinkler system in appellant's building, but permits identical or inferior buildings adjacent to and directly competing with appellant without the necessity of any sprinkler system.

3. The legislation attacked is confiscatory because it requires the expenditure of an unreasonably large sum of money on a practically fireproof building, with practically no benefit and with no necessity.

POINT 1.

Since the judgment of the Court below is based on a motion of appellee and not on proof, appellant is entitled to every fair intendment of the complaint and the complaint is legally sufficient.

In the present appeal, the complaint was dismissed on motion of the appellee, and without giving appellant an opportunity to present any proof (Record, page 2).

This action in the New York Supreme Court is governed

by Section 275 of the New York Civil Practice Act, which provides as follows:

> "*Construction of pleadings.* Pleadings must be liberally construed with a view to substantial justice between the parties."

Since the complaint in the Court below was dismissed on motion of the appellee, the appellant is entitled to every fair intendment of the complaint.

> *Koewinthan* v. *Beth David Hospital et al.*, 9 N. Y. S. 2nd 367 at page 369.

in which the Court said:

> "On a motion for judgment on the pleadings, just as a motion to dismiss a complaint before answer for insufficiency, every intendment and fair inference must be attributed to the allegations of the complaint (Dyer v. Broadway Central Bank, 252 N. Y. 430, 432, 169 N. E. 635; Hurwitz v. Hurwitz, 216 App. Div. 362, 215 N. Y. S. 184; Moore v. Bonbright & Co., Inc., 202 App. Div. 281, 195 N. Y. S. 854) to determine whether a cause of action may be spelled out."

Consequently, if the complaint spells any cause of action, it should not have been dismissed. This is particularly true since no leave to amend the complaint was granted below.

> *Dobbins* v. *Los Angeles*, 195 U. S. 223.

It will hereafter be shown that the complaint was legally sufficient.

POINT 2.

The legislation attacked is discriminatory, because it provides for the installation of an automatic wet pipe sprinkler system in appellant's building, but permits identical or inferior buildings adjacent to and directly competing with appellant without the necessity of any sprinkler system.

In the statement of the case herein, page 5, and in the statement as to jurisdiction at pages 8 and 9, appellant has set forth the factual situation with reference to existing lodging houses in the City of New York and to other buildings which might hereafter be converted to lodging houses. Existing lodging houses in the City of New York are centralized in a small district, where there is practically no open space. Consequently, anyone who desires to enter the lodging house business would either buy an existing building, wreck it, and erect a new building; or, much more likely, buy an existing building not used for dwelling purposes and convert it to a lodging house.

The statute attacked by its terms applies only to lodging houses existing prior to the enactment of the legislation on April 5, 1944. The enactment does not apply to buildings thereafter to be built or existing buildings thereafter to be converted. The appellant in the present case built its house in 1940 in conformance with every requirement of a stringent law (paragraphs 4 to 7 inclusive of the complaint, Record, page 6), and appellant's house is in every respect safe and proper (paragraph 13 of the complaint, Record, page 7). Nevertheless, under the legislation attacked, anyone else may buy an old loft building of much inferior construction immediately adjacent to appellant, and convert the building to a lodging house without the necessity of putting in an automatic wet pipe sprinkler system, or, in fact any sprinkler

system at all. This is not the equal protection of the laws guaranteed by the Fourteenth Amendment.

Fisher v. *Borough Council of Borough of South Toms River*, 13 New Jersey Miscellaneous 852, 181 Atlantic 630;
Michigan Lake Building Corporation v. *Hamilton*, 340 Ill. 284, 172 Northeastern 710;
Dowsey v. *Village of Kensington*, 257 N. Y. 221;
City of Vincennes, Ind. v. *Marland Refining Co.*, 33 Fed. 2nd 427.

This general rule is well set forth in the case of

Cowan v. *City of Buffalo*, 247 A. D. 591, 288 N. Y. S. 239.

as follows:

> "A statute or ordinance which amounts to a denial of the equal protection of the law to persons within the jurisdiction of the lawmaking body must be deemed unconstitutional and void, even if it is passed under the guise of the police power. Dobbins v. Los Angeles, 195 U. S. 233, 237, 25 S. Ct. 18, 49 L. Ed. 169; Gibbons 1. Ogden, 9 Wheat. 1, 210, 6 L. Ed. 23; Missouri, Kansas & Texas R. Co. v. Haber, 169 U. S. 613, 626, 18 S. Ct. 488, 42 L. Ed. 878; Sinnot v. Davenport, 22 How. 227, 243, 16 L. Ed. 243."

The effect of the legislation attacked is exactly as if it said that all lodging houses existing on April 5, 1944 (the date of its enactment), must put in an automatic wet pipe sprinkler system, while other buildings existing and thereafter to be converted, or new similar buildings, need not. It is not claimed that the date bears any reasonable relation to the condition attacked. The legislation is therefore unconstitutional.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266 at page 274.

Should special circumstances be claimed, justifying the classification, such special circumstances should be alleged and proved at the trial.

Borden's Farm Products Company, Inc. v. *Baldwin*, 293 U. S. 194;
Tigner v. *Texas*, 310 U. S. 141.

POINT 3.

The legislation attacked is confiscatory, because it requires the expenditure of an unreasonably large sum of money on a practically fireproof building, with practically no benefit and with no necessity.

Legislation affecting the safety of a large number of persons is ordinarily within the police power of a State. However, as said in

12 Corpus Juris, at page 930.

> "The legislature may not, under the guise of the police power, impose on property burdens so excessive as to work a confiscation thereof."

Cooley's Constitutional Limitations, 8th Edition, at page 1231, lays down the rule as follows:

> "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion."

Has the Legislature of the State of New York gone too far in the present instance? We have here a practically fireproof building, erected a few years ago, having every possible safety device. There is no record of fires in this or similar buildings. The building is a small four-story building, valued at approximately $25,000. It caters to poor people and re-

ceives perhaps 35¢ a night for lodging. Every fire precaution has been taken. All this has been done in conformity with the law.

It is true that there are a great many other lodging houses in the City of New York, which do not meet these high requirements for safety construction and maintenance. No attack has been made upon the legislation insofar as it affects these other buildings, for which it was actually intended. But has not the legislature gone too far where the present building is concerned? It is true that the line may be hard to draw, but appellant is entitled to every reasonable inference in its behalf. Obviously, the present building cannot burn without giving ample opportunity to the occupants of its open dormitories for safe egress. If this legislation is constitutional in the case of a four-story building, would it be constitutional in the case of a one story building? Whatever the final outcome of this case may be upon the trial, is not appellant entitled to show that the tremendous expense to it, without any appreciable benefit, is such as to render the legislation confiscatory. The general rule in New York is set forth in

Adamec v. *Post*, 273 N. Y. 250 at page 256,

as follows:

> "Even so, as the court pointed out in Health Department of City of New York v. Rector, etc., of Trinity Church, supra, 145 N. Y. 32, at page 41, 39 N. E. 833, 836, 27 L. R. A. 710, 45 Am. St. Rep. 579, the discretion of the Legislature is not absolute. "The improvement or work must in itself be a reasonable, proper and fair exaction when considered with reference to the object to be attained. If the expense to the individual under such circumstances would amount to a very large and unreasonable sum, that fact would be a most material one in deciding whether the method

or means adopted for the attainment of the main object were or were not an unreasonable demand upon the individual for the benefit of the public." In the same case the court quoted with approval from the opinion of Mr. Justice Holmes, speaking for the Supreme Court of Massachusetts in Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, a L. R. A. 81, 12 Am. St. Rep. 560: "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones would not be except by the exercise of the right of eminent domain."

The same rule as set forth above concerning the large expense and small benefit, was laid down by this Court in an opinion by Mr. Justice Holmes in

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393.

Litigation seeking to declare a statute unconstitutional as confiscatory is common. In all prior cases in the State of New York other than *Adamec* v. *Post* (*supra*), the complaint was not dismissed on motion but a hearing was had on the merits.

Cockroft v. *Mitchell*, 187 A. D. 189, Affirmed without opinion, 230 N. Y. 630;
Health Department v. *Rector*, 145 N. Y. 43;
Tenement House Department v. *Moeschen*, 179 N. Y. 325, 203 U. S. 383.

While the complaint was dismissed on motion in *Adamec* v. *Post* (*supra*), the complaint in that action attacked the Multiple Dwelling Law only on on the theory that the expense was great, and without attempting to show that the

great expense was confiscatory with reference to the benefit to be attained. The complaint in the present case is careful to set forth that the benefit to be obtained by the statute is negligible, while the expense is confiscatory (paragraphs 22 and 24 Subdivision (b) of the complaint, pages 8 and 9 of the Record).

CONCLUSION.

The final judgment appealed from should be reversed.

Respectfully submitted,

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FILE COPY

Argued by
EDWARD G. GRIFFIN,
for Appellee.

Office - Supreme Court, U. S.
FILED
MAR 27 1946
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,
Appellant,

against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,
Appellee.

ON APPEAL AS OF RIGHT FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK PURSUANT TO §267A OF THE JUDICIAL CODE.

BRIEF FOR THE APPELLEE

March 23, 1946.

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Supreme Court of the United States

OCTOBER TERM, 1945

No. 769

QUEENSIDE HILLS REALTY CO., INC.,

Appellant,

against

T. NEWTON SAXL, as Commissioner of Housing and Buildings of the City of New York,

Appellee.

APPELLEE'S BRIEF

Preliminary Statement

The appellee, presents this Brief on his behalf in the appeal by Queenside Hills Realty Co. Inc., the plaintiff-appellant below, from a unanimous judgment of affirmance by the Court of Appeals of the State of New York (R. 24-25), which affirmed the order of the New York Supreme Court, Appellate Division, First Department (omitted in printing), unanimously affirming the resettled order of the New York Supreme Court, Special Term, New York County (R. 3), and the judgment entered thereon in the office of the Clerk of that County (R. 2), where the motion of William Wilson, the then Commissioner of Housing and Buildings of the City of New York, the original defendant-

appellee, after answer, for judgment on the pleadings and dismissal of the complaint, was granted.

The Court of Appeals denied plaintiff-appellant's motion for reargument, but recalled its remittitur and amended it to show that "A question under the Constitution of the United States was presented and necessarily passed upon" by the Court. The question presented is the constitutionality, under Section 1 of the Fourteenth Amendment of the Constitution of the United States, of Section 13 of the Multiple Dwelling Law of New York, as amended by Laws of New York of 1944, Chapter 553, in requiring all existing lodging houses within the City of New York to be equipped or constructed with certain safeguards, of which the principal item complained against is the installation of an automatic wet pipe sprinkler system.

Opinions Below

No opinions were rendered in any of the three courts below* (R. 24, 25). The decision of Mr. Justice CARROLL G. WALTER sitting in the New York Supreme Court, Special Term, Part 3, New York County, before resettlement of his order (R. 3-4), is unofficially reported in the *New York Law Journal* of October 27, 1945; the unanimous order of affirmance by the New York Supreme Court, Appellate Division, First Department, is reported in 269 App. Div. 691; the unanimous affirmance by the Court of Appeals of the State of New York is reported in 294 N. Y. 917; the denial of the motion for reargument and the requested

* What is entitled the opinion of the Special Term (R. 22) is a memorandum of decision only.

return of the remittitur for amendment to show that a question arose under section 1 of the Fourteenth Amendment of the Constitution of the United States is reported in 295 N. Y. 567; the order of Chief Judge LOUGHRAN of the Court of Appeals allowing this appeal is at pages 27-28 of this transcript of record.

Jurisdiction

Jurisdiction is invoked under 237, paragraph a of the Judicial Code (344, Title 28, U. S. Code)*. (R. 26-30). An order noting probable jurisdiction was made by this Court on February 11, 1946 (R. 34). Since the case arose, William Wilson, the original defendant herein, resigned as Commissioner of Housing and Buildings of the City of New York, and this Court by its order has substituted T. Newton Saxl, his successor, duly qualified and acting as such, as appellee.

Statement of the Case

The Pleadings

Appellant, as plaintiff, sought by its complaint under its first cause of action a declaratory judgment in equity declaring the law regulating lodging houses in the City of New York unconstitutional, as denying the plaintiff and all persons similarly situated due process, and as confiscatory and discriminatory under the State and Federal

* Our first law point in this brief argues against the fullness of jurisdiction appellant assumes to find thereunder in this Court. The Assignments of Error (R. 30) in items 8, 9 and 10 are broader than the Remittitur, as amended by the Court of Appeals, allows (R. 26).

Constitutions (R. 9). In its second cause of action appellant raised a question of statutory construction, alleging that the statute assailed does not apply to its building, but only to lodging houses erected prior to the enactment of the Multiple Dwelling Law of New York on April 18, 1929 (Laws of 1929, Chapter 713; Chapter 61A of the Consolidated Laws). The statute assailed amended subdivisions 1, 2, 3, 4, 5, 6, and 7 of Section 13* of the Multiple Dwelling Law by Laws of 1944, Chapter 553, effective April 5, 1944. Appellant's prayer for relief asked for a declaratory judgment declaring null and void and of no effect the statute assailed as applied to appellant's building and all buildings similarly situated; for injunctive relief against the defendant-appellee; for mandatory relief directing the defendant-appellee to remove of record the violation posted against the plaintiff-appellant, or any similar violations posted against premises similarly situated; and for other and further and different relief (R. 9-10).

Declaratory judgments are provided for under §473 of the Civil Practice Act of New York and Rules 210-214 of the Rules of Civil Practice.

Appellant annexed to its complaint as an exhibit a copy of defendant-appellee's Notice of Violation and the defendant-appellee's Instructions issued in such cases (R. 10-13).

Appellee answered by denying in generality or specifically all plaintiff-appellant's substantial contentions, setting up affirmatively (R. 15-16) legislative findings made at the time of the original enactment of the Multiple Dwell-

* In the order of the Court of Appeals allowing this appeal (R. 27-28) this is referred to as "Section 4 of Chapter 533 of the Laws of 1944." This "Section 4" is the Session Law number.

ing Law in 1929, and alleging that plaintiff's premises at 312-314 Bowery, in the Borough of Manhattan, consist of a non-fireproof lodging house which is a Class B multiple dwelling; that plaintiff-appellant's premises are unsafe, and further alleging the statute assailed is within the police power (R. 16-17). Annexed as an exhibit is a copy of a report of the Temporary Commission to Examine and Revise the Tenement House Law dated January 24, 1929 (R. 18-21). Defendant's Exhibit B, annexed to its answer, is the same as appellant's exhibit annexed to its complaint.

We refer to defendant-appellee's denials and new matter alleged in his answer and exhibit, not because under demurrer *practice*, common everywhere, the allegations of the complaint in the *practice* on the motion were not taken as true; but because on the *substantive* question of constitutional law the Court's could scan the verified answer (R. 17), and exhibit for information as to what is the factual situation *generally* affected by the legislation. A verified suggestion by a public officer stating a jurisdictional fact has been accepted by this Court before in *Ex Parte State of New York, No. 2* (1920), 256 U. S. 503, 509-10. Under Rule 112 of Rules of Civil Practice, the Courts below could scrutinize either pleading.

The facts argued below and asked to be judicially noticed really constitute the factual body of this case. These facts, which were mostly presented upon the pleadings, exhibits and briefs of counsel, are as follows:

1. The Message of the Governor.

Governor Dewey in signing the bill, enacted as the statute here assailed, filed the following memorandum:*

---

* This was called to the attention of the courts below.

"STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY

April 6, 1944.

MEMORANDUM filed with Senate Bill,
Introductory Number 1218,
Printed Number 1840, entitled:
'AN ACT to amend the multiple dwelling
law, in relation to fire protection
in existing lodging houses.'

APPROVED: —

This bill imposes certain standards of safety for a type of lodging house that is characterized as a 'flop house.' These so far have been unregulated. This type of building was involved in the tragic and disastrous loss of life as the result of a fire in New York City in December 1943. It seems unbelievable that first we ignore the conditions under which some people live and then when we ascertain the great hazards of those conditions we, by regulations, further validate the existence of those conditions. To leave them unregulated would, however, be the worse evil. Much more remains to be done.

The bill is approved.

(Signed) THOMAS E. DEWEY"

2. *The Inception of the Legislation.*

Appellant said in its brief below (p. 3, par. 7): "About Christmas, 1943, there was a disastrous fire in an old lodging house in West 42nd Street, New York City. As a result of agitation following this fire, the Legislature adopted" the statute assailed. It is also a notorious fact that 19 lodgers died in that fire.

Plaintiff-appellant further alleged in his complaint (R. 17):

"17. That at no time has any fire occurred in any lodging house built since the year 1929 in which there has been any loss of life and that the safeguards imposed by the Multiple Dwelling Law as it existed on April 4, 1944, and other laws and regulations applicable thereto, are in all respects adequate and sufficient to prevent a loss of life."

Defendant in its answer, paragraph Sixth, denied information sufficient to form a belief as to whether any fire occurred in any lodging house built since 1929 in which there was any loss of life (p. 15).

The bill enacted as Chapter 553, of the Laws of 1944, was not the City's bill, but was proposed by "The Association of Lodging House Keepers of New York, Inc." and other persons in conjunction with Mr. George H. Hallett, secretary of the Citizens' Union, who sought to protect the public interest. The City's bill was that introduced by Assemblyman Mitchell, being Assembly Pr. No. 434; Introductory No. 427. It did not move after reference to committee. The bill passed was introduced as Senate Print Nos. 1377, 1840; Senate Introductory No. 1218, by Senator Desmond, passed in Senate March 13, 1944, passed in Assembly March 18, 1944, approved by the Governor and effective on April 5, 1944. There were two other bills on the subject also introduced, which did not move after reference (Senate Pr. 995; Int. No. 303; Assembly Pr. 26; Int. No. 26).

3. The Reason Why the Statute Assailed Was Made Applicable to Existing Lodging Houses Only.

It was argued by defendant-appellee below that due to the scarcity of materials and because of priorities, no new lodging houses had been built in New York City since the War began, and that there did not exist during the course

of the litigation in the State Courts after April 5, 1944 (the date of enactment of the statute assailed), as there does not now exist, any new lodging houses. The plaintiff-appellant, so far as we can find, nowhere denied those statements of fact in the briefs of appellee below.

4. The Mitchell Committee.

Contemporaneously with the enactment of the statute assailed there was appointed a Joint Legislative Committee to Recodify the Multiple Dwelling Law, which has filed two reports, is still investigating, and has, at the current session, introduced legislation to cover new construction of lodging houses. This committee was created by a Joint Resolution adopted by the Assembly, March 15, 1944, and by the Senate, March 17, 1944, providing for a Joint Committee: "to investigate and make a detailed study of the provisions of the Multiple Dwelling Law of the State of New York; to examine into the regulatory language contained in such law for the purpose of revising and amending the same, as well as bringing up to date its provisions in accordance with modern principles of building construction and in the light of affording maximum tenant protection," etc. Assemblyman MacNeil Mitchell is Chairman of that Committee. Its reports are legislative documents (1945) No. 46, and (1946) No. 4. These were not brought physically to the attention of the courts below, but we beg leave to hand up copies thereof to this Honorable Court under its own rules of judicial notice. Their significance lies in the fact that at page 8 of No. 46 there is a tabulation of Class A and Class B multiple dwellings in New York City. Under "B", the lodging houses existing are found only in the Borough of Manhattan, where there are 123,

and in the Borough of Brooklyn, where there are 22, making a total of 145, accommodating approximately 15,000 persons. This is the only reference to lodging houses in either report, but the reports do indicate that the Committee has continued to function in studying the subject of multiple dwellings generally.

There have been introduced in the Legislature Assemblyman Mitchell's bill amending Section 13 of the Multiple Dwelling Law, and Senator Coudert's bill amending the same section (Assembly Int. No. 2620, Pr. Nos. 2936, 3240; Senate Int. No. 2291, Pr. Nos. 2580, 2823). We have also been shown a draft of further amendments to Section 13 dealing with new construction, prepared upon behalf of the Mitchell Committee. What the course of this legislation will be we ourselves, cannot predict. Whether the pending bills will fail in either House, or whether one or the other will pass, or whether either or both will receive executive approval or disapproval is beyond our gift of prophecy. We cite the legislation to show that the problem appellant seeks to solve as a constitutional difficulty is a statutory one in the hands of the Legislature, where it properly belongs; and it should be left with that body for solution under the tradition of the Great Dissent in *Lochner* v. *New York* (198 U. S. 74-76), and all that has followed after. Because the Legislature still is struggling with the future, shall it now be said the law-makers have not dealt fairly with the present and the past?

5. *Provisions of Statute Involved.*

The Statute is printed as Appendix A in this brief.

Summary of Argument

We shall develop the argument under the following points:

I. This appeal brings here under Section 237a of the Judicial Code only a Constitutional question. The propriety of the practice and procedure as exercised by and before the New York courts in granting judgment on the pleadings to the appellee and in dismissing the complaint is not before the Court.

II. The complaint was fatally defective below because of the omission of any allegation that there now exists or is about to be constructed a single lodging house of the same classification as appellant's in favor of which the statute complained of discriminates against the appellant.

III. The claim of unequal protection of the laws is unjustified, because the legislature recognized that there had been no new lodging houses built since the war and is even now considering legislation for new construction of such buildings.

IV. The claim of costliness is without merit.

POINT I

This appeal brings here under §237a of the Judicial Code only a constitutional question. The propriety of the practice and procedure as exercised by and before the New York Courts in granting judgment on the pleadings to the appellee and in dismissing the complaint is not before the Court.

The complaint, so far as any violation of the first section of the Fourteenth Amendment is concerned, attacks only

the *statute* under which the defendant is acting. There is no question properly brought here that the New York *Courts* have by *the form of their decisions* in dismissing the complaint, denied appellant due process or equal protection, or that they have confiscated appellant's property. The vice, if any, is in the act of the Legislature in amending the Multiple Dwelling Law; not in enacting the Civil Practice Act; nor is the vice in the rules of Civil Practice Act made by our courts; nor in the practice of our courts in granting defendant-appellee judgment on the pleadings and by dismissing plaintiff-appellant's complaint. (See Appellant's Assignments of Error, items 8, 9 and 10 in this Record at pp. 31-32.)

The case comes here under paragraph a of §237 of the Judicial Code dealing with a suit in the highest court of a State where is drawn in question the validity of a state statute as repugnant to the Federal Constitution, and the decision is in favor of the statute's validity. This is the way jurisdiction is stated at page 2 of Appellant's brief. The case is not here pursuant to the Court's discretionary power to review by certiorari, as provided in paragraph b of §237 of the Judicial Code.* We refer to note 4 in the

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* Judicial Code, 43 Stat. 937 (ch. 229, 1925), §237:

"b. It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question * * *; *or where any title, right, privilege or immunity is specially set up or claimed under the Constitution* * * *; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *" (Italics ours.) (See 45 Stat. 54, Act of January 31, 1928, substituting appeal for writ of error.)

opinion of the Court by Mr. Chief Justice STONE in *Ex Parte Peru* (1943), 318 U. S. 578, at pages 585-586 that this Act is designed "to curtail the court's obligatory jurisdiction".

We take it that this Court will not assume the administration of justice in the State civil courts, as involving a constitutional question, wherever seasonable objections and exceptions are made on the dismissal of a complaint, a verdict directed, a verdict set aside, where a triable issue is not found, or a case is decided upon the papers, as in the case at bar; all in accordance with whatever may be the local practice. *Lee* v. *Central Ga. Ry. Co.* (1920), 258 U. S. 109, 110. This Court has refused to find the Constitution involved, even where the courts of different States render contrary decisions on a domicil in conflicting claims for taxes, *Hill* v. *Martin* (1935), 296 U. S. 393; *Worcester County Co.* v. *Riley* (1937), 302 U. S. 292, 299, except under the extraordinary circumstances disclosed in *Texas* v. *Florida* (1939), 306 U. S. 398. Yet appellant here, argues in effect, that neither our intermediate appellate court nor our court of last resort in practice cases, correctly understood or administered §476 of our *Civil Practice Act* or Rule 112 of our Rules of Civil Practice dealing with judgment on the pleadings. Such matters are not within the revisionary powers of this Court as historically understood and exercised.*

Where this Court has reversed and remanded the decisions of state courts in civil cases, because of the denial in the courts themselves of due process or other constitutional safeguards addressed to the states, it has, since

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* *The Origin and Scope of the American Doctrine of Constitutional Law*, by the late James B. Thayer; 7 Harvard Law Review, 129-156.

the Act of 1925, so far as we can find, done so under the discretionary power conferred by paragraph b of §267 of the Judicial Code, and not under its "obligatory jurisdiction", pursuant to paragraph a. *Hansberry* v. *Lee* (1940), 311 U. S. 32. See also *Postal Telegraph Cable Co.* v. *Newport* (1918) 277 U. S. 465, decided seven years before the amendment explained by Mr. Chief Justice STONE in his note to *Ex Parte Peru*, *supra*. The *Postal* case came up on a writ of error. The statute then permitted writ of error where was questioned, "an authority exercised under any State", as well as State statutes (Act of Sept. 6, 1916, 39 Stat. 726). The Circuit Court of Appeals for the Fifth Circuit (1940) in the related cases of *Williams et al.* v. *Tooke* and *Hendron et al.* v. *Yount-Lee Oil Co. et al.*, 108 F. 2d 758, 759, expressed the opinion that in such civil cases resort must be made directly here. Subsequently, in *Williams et al.* v. *Tooke et al.*, application for certiorari was denied (1940-1941), 311 U. S. 655. See also the dissent at page 356 in *Riley* v. *New York Trust Co.* (1942), 315 U. S. 348. Yet, in all those cases the denial of due process had to be substantial. *Dennick* v. *Miami Savings & Loan Co.* (1944-1945), 323 U. S. 667, 813, where, in a *per curiam* opinion, an *appeal* was dismissed "for want of a substantial federal question." No opinion was expressed as to whether or not this Court might have entertained an application for certiorari, if the question had been substantial.

Appellant, in the case at bar, never complained about the action of Mr. Justice WALTER at Special Term in not sending the case to trial as a denial of equal protection or due process of law; in its brief in the Court of Appeals, appellant complained of it as judicial error, much as he does here. We submit this does not raise a federal constitutional question in relation to the acts and decisions of

our Courts by themselves. Only the statute complained of is here.

In a series of life and death cases it was argued successfully here:

> "The Fourteenth Amendment is a prohibition against the States. It matters not, therefore, how the State works the exclusion, 'whether through its legislature, *through its courts*, or through its executive or administrative officers'." (Emphasis supplied). (Petitioners' Brief, p. 60, in *Powell* v. *Alabama* (1932), 287 U. S. 45, citing *Carter* v. *Texas* (1900), 177 U. S. 442.)

There, however this Court exercised its discretion and brought up the cases by certiorari pursuant to paragraph b of §237 of the Judicial Code.

Of course, in a criminal case a complainant has the additional advantage of the summary writ of habeas corpus; but the application should first be made in Federal District Court, *Ex Parte Hawk* (1944), 321 U. S. 114 (317 U. S. 397); or the denial of habeas corpus in the state court may be reviewed here on certiorari, *Hawk* v. *Olson* (—U. S.—Nov. 13, 1945). In *Palko* v. *Connecticut* (1937), 302 U. S. 319, the case came here by appeal; but there it was the statute permitting the prosecution to appeal in a criminal case that was unsuccessfully attacked as imposing double jeopardy; not any violence in the Connecticut courts themselves was charged by the appellant there. Certiorari seems to be the accepted form of reviewing claims of denial of due process by state criminal courts: cases related to the *Powell* case, *Norris* v. *Alabama* (1935), 294 U. S. 580; *Patterson* v. *Alabama* (1935), 294 U. S. 600; or like *Snyder* v. *Massachusetts* (1934), 291 U. S. 97; *Brown* v. *Mississippi* (1936), 297 U. S. 278; *Avery* v. *Alabama* (1940), 308 U. S.

45; *Betts* v. *Brady* (1942), 316 U. S. 455; *Williams* v. *Kaiser* (1945), 323 U. S. 471; *House* v. *Mayo* (1945), 324 U. S. 212; *White* v. *Rogers* (1945), 324 U. S. 760 (where certiorari went to review denial of habeas corpus in the State court of last resort). However, in *Buchalter* v. *New York* (1943), 319 U. S. 427, when this Court brought up by certiorari the affirmance of a death sentence by our New York State Court of Appeals, this Court refused to speculate on denial of due process in the trial court, as the appellant in the case at bar now asks this Court to do. Certainly the supreme rights of life or liberty tested in a criminal case are not to be compared to the denial of a judgment to the litigant here, with so many other remedies open to it to test a somewhat unsubstantial constitutional question.

Surely not every *defeated* litigant is denied due process or equal protection of the laws in the Courts. Where this Court reverses a state court on a constitutional question, the court below may be chargeable only with error, while at the same time having been most meticulous in extending due process and administering equal protection so that neither plaintiff nor defendant may complain upon these grounds.

We await the production of a case where this Court has said that the mere management by a State court of procedural forms in a civil suit has amounted to a denial of due process or equal protection. We admit the possibility of the abuse of civil processes, as shown under the *Hansberry* case and others, *supra*, but we cannot find abuse present in the action of the courts whose judgments are now brought here for review. Surely, the denial of a declaratory judgment is highly discretionary under our local law as interpreted by the Court of Appeals and under Rules 211 and 212 of the Rules of Civil Practice, *Bareham* v. *City of Rochester* (1927), 246 N. Y. 140, 143;

although the discretion must be exercised judicially and not arbitrarily, *James* v. *Alderton Dock Yards* (1931), 256 N. Y. 298, 305. Nevertheless, the judicial discretion in granting the remedy may be abused, *Woollard* v. *Schaffer Stores Co.* (1936), 272 N. Y. 304.

This Court reviewed and reversed arbitrary action of a quasi-judicial railroad rate regulatory body in *Oregon R. R. & N. Co.* v. *Fairchild* (1912), 224 U. S. 510, 524, 527, 528. The case came up on a writ of error, "in which it is contended that the (State of) Washington *statute* failed to furnish an adequate hearing or opportunity for judicial review * * *" and, further, complaining against the procedure in the tribunal itself (p. 517. Our emphasis). This procedure complained about must have been pursued by the tribunal under the challenged provisions of the statute itself.

In the case at bar, however, the appellant has heretofore not complained against the judicial process as unconstitutional.

This Court has had under consideration some aspects of declaratory judgments in:

Willing v. *Chicago Auditorium Assn.* (1928), 227 U. S. 274;
Piedmont and Oregon Ry. Co. v. *United States* (1930), 280 U. S. 469;
Aetna Life Insurance Co. v. *Haworth* (1937), 300 U. S. 327.

See, also, Borchard *Declaratory Judgments* (2nd Ed.), pp. 174-203; Anderson, *Actions for Declaratory Judgments*. We have nowhere found authority supporting appellant's claim to review here the practice in the State Courts as set forth in Points 1 and 3 of its law points.

POINT II

The complaint was fatally defective below because of the omission of any allegation that there now exists or is about to be constructed a single lodging house of the same classification as appellant's in favor of which the statute complained of discriminates against the appellant.

This Court has been exacting in requiring definite pleading of constitutional questions: *Pacific States Co.* v. *White* (1935), 296 U. S. 176, 185 and cases cited; *Wiley* v. *Sinkler* (1900), 179 U. S. 58, 66, where the complaint did not state the facts constituting a cause of action in alleging a violation of the constitution.

Appellant made the first pleading: it was there for it to state its case, viz., that it and others similarly situated had, not in theory, but *in fact*, been selected for discrimination. The gravamen of appellant's action, under the principal federal question argued below, is pleaded in paragraph 24, subdivision a, of his complaint as follows (R. 8-9):

> "(a). Said law deprives plaintiff and all persons similarly situated of an equal protection of the law since under said chapter 553, Laws of 1928* and under the Multiple Dwelling Law as the same now exists, any person may lawfully erect a building in the same locality as plaintiff's and in all respects similar to plaintiff's building and operate the same without any legal necessity for complying with chapter 553 of the Laws of 1944."**

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* *Sic.* No doubt meaning Laws of 1944, effective April 5, 1944.

** Formally denied in Appellant's answer, paragraph First, (R. 14).

Appellant further *argued* the hypothesis, that existing buildings might be altered into lodging houses, whereupon this statute would be inapplicable as to them, as well.

This complaint is fatally defective because of the omission of any allegation that there now exists or is about to be constructed a single lodging house, of the same classification as appellant's, in favor of which the statute complained of discriminates. May we suggest that assuredly while the case was pending at Special Term, and in the Appellate Division probably, there was ample provision under our local practice to amend the pleading, if appellant could truthfully and soundly make this allegation; and even at this late day, if there has fortuitously and suddenly come into existence any state of facts supporting such an allegation of discrimination, appellant is free to begin this entirely different cause of action untouched of *res judicata*. See Civil Practice Act, §§245, 245b, 111, 112, dealing with amendments of a Complaint.

POINT III

The claim of unequal protection of the laws is unjustified, because the legislature recognized that there had been no new lodging houses built since the war and is even now considering legislation for new construction of such buildings.

The statute against which the appellant complains is stop-gap, war-time legislation intended to meet an emergency.* There is no case we can find holding that a legis-

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* See ***Statement of the Case,*** pages 6-9 of this brief.

lature is constitutionally bound to anticipate conditions that do not exist, or all that can be imagined.

Of all these things relating to legislative committees, existent physical conditions, investigations, messages of the Governor and the course of legislation, the courts of New York, whose three decisions are brought under review here, could take judicial notice:

Tenement House Dept. v. *Moeschen* (1904), 179 N. Y. 325; Judgment affirmed without opinion, 203 U. S. 583;
Grimmer v. *Tenement House Dept.* (1912), 204 N. Y. 370;
Browne v. *City of New York* (1925), 241 N. Y. 96, 122;
Peo. ex rel. Cohen v. *Butler* (1st Dept., 1908), 125 App. Div. 384, 388.

If we may be permitted to invert a famous phrase—It is a theory, not a condition which confronts us. The record, of course, is scant, but that is also the appellant's misfortune. We submit that this beneficent emergency legislation protecting lodgers should not be obliterated or suspended, because imaginable, but non-existent cases, are not for the instant covered by the law.

In the New York Court of Appeals the rule is established that a judgment may be sustained, *but not reversed*, by supplying proof, even in the appellate courts, "which is a matter of record that cannot be answered or changed."

Stemmler v. *Mayor of New York, etc.* (1904), 179 N. Y. 473, 482 and cases cited;
People v. *Flack* (1915), 216 N. Y. 123, 129-130;
Bull v. *Burton* (1919), 227 N. Y. 101, 110.

The messages of the Governor, the Legislative bills, the journals of the Assembly and the Senate, the reports of the Legislative Committees, are all of record in public offices and "cannot be answered or changed". The validity of the judgments of the New York Courts should not fail, simply because appellant has not brought here a record containing facts and circumstances which the New York Courts did, or could now examine under the rules of judicial notice, or which the Court of Appeals or Appellate Division could have supplied by actual proof. (They did not feel the need of proof, however, but proceeded under rules of judicial notice or on the uncontroverted statements of counsel.)*

Moreover, in *Borden's Co.* v. *Baldwin* (1934), 293 U. S. 194, 205, this Court did apply the rules of judicial notice in principle, if not in fact, as freely as do the New York Courts, when this Court looked into the proceedings of a New York Legislative Committee and was aided in interpreting by "suggestions which the Attorney General of the State and the counsel for the Department of Agriculture and Markets, with their special experience, have been able to bring forward". Mr. Chief Justice HUGHES further said in that case at page 209:

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* We do not imply that there we ourselves brought to the attention of our courts the reports of the Mitchell Committee on Multiple Housing, or the current proposed legislation on lodging houses. We simply say these documents exist and tend to sustain the judgments below, if this court itself sees fit to notice them under its own rules. This Court has gone far under the suggestions of the late Mr. Justice BRANDEIS, when he was at the Bar, in accepting factual statements on the briefs of counsel, when constitutional questions were considered, *Muller* v. *Oregon* (1908), 208 U. S. 395; and our Court of Appeals has followed this Court's example in *People* v. *Charles Schweinler Press* (1915), 214 N. Y. 395, and in many other cases.

> "When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matter which may be judicially noticed, or to other legitimate proof that the action is arbitrary."

To like effect see the opinion of Mr. Chief Justice Stone in *Metropolitan Co.* v. *Brownell* (1935), 294 U. S. 580, 589, where he collects the cases.

After this statement of the principle of judicial notice in the *Borden's Company*, case, this Court, however, found it inexpedient, if not impossible, on demurrer, to examine the immensely complex, economic, commercial, and industrial conditions involved in the attack on the constitutionality of the New York Milk Control Legislation assailed there; and, therefore, remanded the case for a ventilation of the facts by the trier thereof.*

The present Chief Justice of the United States and Mr. Justice Cardozo, in concurring in the result of the decision in the first *Borden's Company* case, said in a memorandum, 293 U. S. at page 213:

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that

* After trial before a Special Master, a "Triune" Court sitting in the Southern District of New York dismissed the bill upon the merits, *sub nom. Borden's Farm Products Co.* v. *Ten Eyck*, 11 F. Supp. 593 (1935). On appeal, the decree was affirmed here, four Justices dissenting, in 297 U. S. 251 (1936).

the production of evidence will make the answer to the questions clearer.

Since our brethren find that likelihood to be present in this case, and are content to postpone an adjudication of the merits, we refrain from any discussion of the validity of the statute on the basis of facts within the range of judicial notice, and assent to the judgment recommended in the opinion of the court."

The case at bar presents no such complexities; a trial can result only in a circumlocution of the uncontradicted. Here there are no such factual difficulties as the majority of the Court also found required a trial of the facts in *Gibbs* v. *Buck* (1939), 307 U. S. 66, or in *Polk Co.* v. *Glover* (1938), 305 U. S. 55, and *Chastleton Corp.* v. *Sinclair* (1924), 264 U. S. 543. We note, however, that this Court in remanding in all these cases, including the *Borden's Company* case, was exercising its jurisdiction within its own system of Federal Courts, and was not sending its mandate to State civil courts. We think appellant's counsel will not here and now challenge our statement that there do not exist any lodging houses built, or buildings altered into lodging houses, since the statute attacked took effect.

A litigant who really believes he has a triable issue of fact does not ordinarily subject himself to the risk of dismissal of his complaint in the exercise of discretion by seeking a declaratory judgment.* In real cases of adversary parties, he frames his complaint in one of the con-

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* RULES OF CIVIL PRACTICE—Rule 212. *Jurisdiction discretionary.* If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

ventional forms and awaits the issue of fact to arise on the answer. Usually he expects to prevail on his own papers when he seeks this extraordinary relief, as in *Wingate* v. *Flynn, Secretary of State* (1931), 139 N. Y. Misc. 779; aff'd without opinion 256 N. Y. 690; or agrees with his adversary on a submitted controversy, as in *People* v. *Tremaine* (1929), 252 N. Y. 27. Appellant's complaint about necessity for a trial here is an afterthought.

Another matter should also be considered. Even if there should arise the accident of an existing structure being altered into a lodging house or a new lodging house itself built while the proposed legislation affecting new lodging houses is pending for enactment, the City of New York through the "Department of Housing and Buildings and Fire Department had" [has] "ample powers to enforce adequate precautionary methods under §§300-309 of the Multiple Dwelling Law and §§487a-1.0, 487e-2.0 and 491a-2.0 of the Administrative Code". These quoted words are taken from the Reporter's notes of our contentions in attaining the decision below, reported in 294 N. Y. 917, at 918. The statute assailed here itself provides in its section 4, subd. 7:

> "Nothing contained herein shall be deemed to abrogate the powers or duties vested in the fire commissioner of the fire department of the city of New York under the provisions of chapter nineteen of the administrative code of the city of New York."

It is presumed always that public officers will do their duty and will not permit discrimination, *Lieberman* v. *Van DeCarr* (1905), 199 U. S. 552, 560. At all events, no harm can come to appellant until new lodging houses are built,

or the public officers do violate its rights and the pending legislation fails completely.

So the case at bar becomes like *U. S. v. Caroline Products Co.* (1938), 304 U. S. 144, where this Court took judicial notice of and looked into the reports of Congressional Committees. There the Federal statute involved did not, just as the State statute here does not, embrace all imaginable cases, but this Court overruled the demurrer and the constitutionality of the law assailed was upheld.

Appellant takes the doctrinaire position that the statute is unconstitutional on its face, because it applies only to the situation existing at the time of its enactment. The courts below were urged to dismiss this action upon the ground that there is no presently existent situation where discrimination can result. This impossibility of discrimination is the "state of facts" that "reasonably can be conceived" under the first *Borden's Company* case in 293 U. S. at 209. Since no opinions were published in any of the three courts below, we are justified in assuming that the burden of our argument was likewise borne by the courts below.

Appellant bears the burden of reversing. The judgments below are presumptively correct. The problem is not whether we have brought here enough to sustain the findings below; but whether appellant can fulfill the task of an affirmative in a questing constitutional case, and thus reverse. There were other methods of testing our law by judicial process it surely could have sought, rather than the highly discretionary declaratory judgment it found convenient to its needs. The remedy apparently was denied appellant as a matter of law under Rule 212 of the Rules of Civil Practice.

POINT IV

The claim of costliness is without merit.

Appellant pleaded in paragraph 24, subdivision b of its complaint (R. 9), deprivation of property amounting to confiscation, under the statute assailed. In paragraph 22 (R. 8) it pleads that its Clover Hotel "has a market value of approximately $25,000" and that "the cost of complying with any applicable parts of said violation is the sum of approximately $7,500 * * *". Again we refer, under the New York rule cited *supra*, to record facts "that cannot be answered or changed". The assessment books in the Real Estate Bureau of the Tax Department of the City of New York show that this property is assessed for the tax year 1943-44 (including April 1944, when the assailed statute took effect), under Block 521, Lot 75, at a total of $78,000, of which $34,000 was allotted to the land and $44,000 to the building. A $4,000 rehabilitation exemption was allowed on this $78,000 under Local Law No. 264. If the appellant so underestimates the property value, it is arguable, at least, he likewise overestimates the cost of compliance.

While these particular facts, disclosed in a public office of record, were not called to the attention of the New York Courts, they are facts, however, which the Appellate Division and Court of Appeals would have judicially noticed or accepted as proof. We submit that this Court has equal competence to accept this statement of fact; at least, until Appellant denies our accuracy or states the contrary. *Ex Parte State of New York, No. 2* (1920), 256 U. S. 503, 509-10, *supra*.

In the courts below we relied upon *Adamec* v. *Post, as Tenement House Commissioner of the City of New York*, (1937), 273 N. Y. 250, 258-260; 109 ALR. 1401. There, on the City's motion, the complaint was dismissed on the ground that it failed to state a cause of action. (Just as here, grounds of "demurrer" were resorted to.) In that case the property was assessed at a total of $13,500—$5,000 for the land and $8,500 for the building. The cost of alterations required under the Multiple Dwelling Law was alleged to be "upwards of $5,000".

Chief Judge LEHMAN said, at page 260, for a unanimous Court;

> "It does not appear and it is not claimed that the alterations are not reasonably calculated to attain this object and it can hardly be argued that the imposition of a cost of $5,000 to attain that result in a tenement house containing 40 rooms is unreasonable even though it may cause hardship in an individual case. Because the State has tolerated slum dwellings in the past it is not precluded from taking appropriate steps to end them in the future."

We can perceive no justiciable issue to be tried upon the opinion of appellant that compliance "would require a large expenditure of money with very little benefit and without any necessity therefor and any finding by any competent legislative body that any condition exists requiring the exercise of the police power of the State of New York" (R. 9). The legislation introduced this year by the Mitchell Committee, and the "flop-house" fire so eloquently described below by the appellant, lead to the conclusion that the legislation in its instant application is reasonable and is justified factually by sufficient legislative investigation.

CONCLUSION

The judgment appealed from should be affirmed.

New York, N. Y., March 23, 1946.

Respectfully submitted,

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APPENDIX A

CHAP. 553, LAWS OF 1944
Approved by Governor
April 5, 1944

AN ACT

TO AMEND THE MULTIPLE DWELLING LAW, IN RELATION TO FIRE PROTECTION IN EXISTING LODGING HOUSES

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision four of section four of chapter seven hundred thirteen of the laws of nineteen hundred twenty-nine, entitled "An act in relation to multiple dwellings, constituting chapter sixty-one-a of the consolidated laws," is hereby amended to read as follows:

4. (a) A "class A" multiple dwelling is a multiple dwelling which is occupied, as a rule, for residence purposes and not transiently. This class shall be deemed to include and shall include tenement houses, flat houses, maisonette apartments, apartment houses, apartment hotels, bachelor apartments, studio apartments, duplex apartments, kitchenette apartments, and all other multiple dwellings except class B multiple dwellings as defined in subdivision five of this section, whether or not such other multiple dwellings are specifically designated by name in this subdivision.

(b) An "apartment" is that portion of a multiple dwelling consisting of a group of rooms containing at least

one bathroom and arranged to be occupied by the members of a family, which group of rooms is separated and set apart from all other groups within a multiple dwelling.

(c) "Single room occupancy" shall be deemed to be an occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment, in a multiple dwelling, so that the occupant or occupants thereof reside within an apartment separately and independently of the other occupant or occupants of the same apartment.

(d) A "single room occupancy building" is a class A multiple dwelling used or let for single room occupancy which conforms to section two hundred forty-eight of this chapter.

§ 2. Subdivision six of section four of such chapter is hereby amended to read as follows:

6. (a) A "hotel" is an inn having at least thirty sleeping rooms.

(b) A "rooming house" or a "furnished room house" is any class B multiple dwelling, other than a hotel, having less than thirty sleeping rooms and in which persons either individually or as families are housed or lodged for hire or otherwise, with or without meals.

§ 3. Subdivision seven of section four of such chapter, as last amended by chapter nine hundred thirty of the laws of nineteen hundred forty-one, is hereby amended to read as follows:

7. A "lodging house" is any class B multiple dwelling, other than a hotel, a rooming house or a furnished room house, in which persons are harbored, or received, or lodged,

for hire for a single night, or for less than a week at one time, or any part of which is let for any person to sleep in for any term less than a week.

§ 4. Section thirteen of such chapter is hereby amended to read as follows:

§ 13. Application to existing dwellings. 1. Any building heretofore erected and occupied at the time this chapter becomes effective, or thereafter, as a tenement house, which is not recorded as such in the department heretofore charged with the enforcement of the tenement house law, shall be required to comply with all of the provisions of this chapter governing the like class or kinds of dwelling hereafter erected. But except as otherwise expressly required in this section and in sections twenty-five and thirty-three of this chapter, nothing in this chapter shall be construed to require any change in the construction or use or occupancy of any fireproof multiple dwelling, or any non-fireproof hotel, or any lodging house, or any rooming house, other than a converted dwelling, heretofore erected, used and occupied as such under the provisions of all local ordinances, and regulations applicable thereto at the time this chapter becomes effective; but should the use or character of occupancy of any such dwelling be hereafter altered or converted, such dwelling shall be required to comply with the provisions of section eight of this chapter.

2. In the application of this section, a "dormitory" in a lodging house shall mean any place which is used for sleeping purposes; a "cubicle" shall mean a small, partially enclosed sleeping space within a dormitory, with or without a window to the outer air; and "department"

shall mean the department charged with the enforcement of this chapter.

3. Lodging houses of non-fireproof construction existing prior to the enactment of this subdivision shall comply with the following conditions:

(a) No wood or other combustible facing shall be permitted on the walls, partitions or ceilings of entrance halls, public halls or public stairs. Such wood or other combustile facing shall be removed from the walls, partitions and ceilings of entrance halls, public halls and public stairs.

(b) Except a flat base-board not exceeding ten inches in height, the stair string and hardwood handrails, all wood soffits, fascias, railings, balustrades and newel posts shall be completely removed and shall be replaced with metal or other hard incombustile material of such size and secured in such manner as may be approved by the department.

(c) Except interior windows or similar openings in a partition forming the enclosure of an entrance hall or public stair or public hall which are used in the operation and maintenance of such buildings and which are protected with automatic fire windows, every window in such entrance hall, public stair or public hall not opening to the outer air and every sash in the walls or partitions of such entrance hall, public stair or public hall shall be completely removed and the openings closed and fire retarded.

(d) In all dormitories, entrance halls, public halls, stair halls, public stairs, storage rooms, cellars and other parts of the building there shall be provided an automatic wet pipe sprinkler system installed and maintained in con-

formity with regulations adopted by the department. In connection with such sprinkler system there shall be an automatic closed-circuit alarm system so arranged and installed as to give warning, at a recognized central station satisfactory to the department, of the closure of any valve controlling water supply to any of the sprinklers and of the operation of any sprinkler head. Such alarm system shall also be so installed and maintained as to actuate an alarm bell at least eight inches in diameter in each dormitory in such building and in the office of the lodging house when a sprinkler operates. Such sprinkler and alarm systems shall have supervisory and maintenance service satisfactory to the department.

(e) All entrance halls, public halls, stair halls and public stairs which have not been fire retarded in accordance with rules and regulations of the department shall be fire retarded on the hall or stair side with half-inch plaster board covered with twenty-six gauge metal or equivalent as approved by the department.

(f) All doors opening upon entrance halls, public halls, stair halls or public stairs shall be self-closing, fireproof doors and such doors shall not be held open by any device whatever.

(g) The cellar ceiling and the ceiling of each story in a building which is used for lodging-house purposes shall be covered with fire-retarding material. The department may accept an existing ceiling if such ceiling is in good condition, provided, however, that such ceiling has been plastered, or covered with metal or with half-inch plaster board covered with metal, or the equivalent approved by the department.

(h) Except partitions forming the enclosures of existing cubicles, all wood partitions and all combustible covering on walls or partitions throughout the portion of the building used for lodging house purposes shall be removed or protected with incombustible material approved by the department.

(i) In all dormitories there shall be aisles providing proper access to all required means of egress and such aisles or other means of egress shall not be obstructed in any manner whatsoever. Main aisles, approved as such by the department to provide adequate approaches to the required means of egress, shall be not less than three feet in width.

(j) All required means of egress shall be indicated by signs reading "EXIT". The letters thereon shall be at least eight inches in height and shall be red on a background of white; and each exit sign shall be illuminated at all times during the day and night by a red light of not less than twenty-five watts or equivalent photometric rating. Such light shall be placed and maintained in a keyless socket. On all floors where doors, openings, passageways or aisles are not visible from all portions of such floors, continuously illuminated directional signs shall be installed and maintained in conspicuous locations, indicating the direction of travel to the required means of egress. At least one such sign shall be easily visible from the doorway of each cubicle.

(k) Access from the public hall at the top story to the roof shall be provided by means of a bulkhead or a scuttle acceptable to the department.

(m) There shall be at least two exits from each floor. Such exits shall be remote from each other. The first exit

shall be to the street or to an enclosed stair. If the floor is above the entrance floor, the second exit shall be to a regulation outside fire-escape or to an additional stair and such second exit shall be accessible without passing through the first exit.

(n) All openings on the course of a fire-escape shall be provided with automatic, self-closing, fireproof, wire glass window assemblies or self-closing, fireproof door assemblies acceptable to the department.

(o) There shall be one or more completely enclosed compartments remote from any stairway for the storage of mattresses, linens, brooms, mops and other paraphernalia incidental to the use, occupancy and maintenance of such building, and such paraphernalia shall be stored in no other portion of such lodging house. The partition forming each such compartment shall be of fire-resistive construction and shall be provided with a self-closing fireproof door, and each such compartment shall be ventilated in accordance with rules adopted by the department. Any space which is used for the storage of mattresses, in addition to conforming to the other provisions of this section, shall be provided with a window not less than ten square feet in area, and such window shall open on a street or yard.

(p) There shall be provided on each floor one or more containers of metal or other hard incombustible material, with self-closing lid, in which all scrap and refuse of a combustible nature shall be placed until finally disposed of.

(q) The portion of any ceiling over and the floor beneath any furnace, stove, boiler or hot-water heater shall be fire retarded, and such fire retarding shall extend for a distance of at least four feet beyond the sides and rear and

eight feet in front of such furnace, stove or hot-water heater. Metal breechings and flues connected to such devices shall be made secure and shall be protected in conformity with regulations adopted by the department.

(r) No insecticide containing inflammable or combustible materials shall be stored without a permit from the fire department, and no such inflammable or combustible insecticide shall be stored except in a completely enclosed room or compartment of fire-resistive construction. Such room or compartment shall be ventilated in accordance with regulations adopted by the department.

(s) The top of the enclosure of every cubicle shall be at least two feet from the ceiling.

(t) Existing cubicles complying with the provisions of this section may be maintained. Nothing herein contained shall be construed to prohibit a rearrangement of existing cubicles made necessary by the provisions of this section.

(u) All parts of every such lodging house shall be inspected by a clerk or watchman at least once in every two hours.

4. The number of persons accommodated on any story in a lodging house shall not be greater than the sum of the following components:

(a) Twenty-two persons for each full multiple of twenty-two inches in the smallest clear width of each means of egress approved by the department, other than a fire escape.

(b) Twenty persons for each regulation fire-escape accessible from such story if it is above the entrance story.

5. The department shall have power to adopt supplementary regulations relating to fire-escapes, protection from fire, and the installation of sprinkler systems and fire alarms in such lodging houses.

6. The department shall cause all lodging houses to be inspected at intervals of not more than three months.

7. Nothing contained herein shall be deemed to abrogate the powers or duties vested in the fire commissioner or the fire department of the city of New York under the provisions of chapter nineteen of the administrative code of the city of New York.

§ 5. This act shall take effect immediately.

SUPREME COURT OF THE UNITED STATES.

No. 769.—October Term, 1945.

Queenside Hills Realty Co., Inc., Appellant, *vs.* T. Newton Saxl, As Commissioner of Housing and Buildings of the City of New York. } Appeal from the Court of Appeals of the State of New York.

[April 22, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1940 appellant constructed a four story building on the Bowery in New York City and since that time has operated it as a lodging house. It was constructed so as to comply with all the laws applicable to such lodging houses and in force at that time. New York amended its Multiple Dwelling Law[1] in 1944,[2] providing, *inter alia*, that lodging houses "of non-fireproof construction existing prior to the enactment of this subdivision"[3] should comply with certain new requirements.[4] Among these was the installation of an automatic wet pipe sprinkler system. Appellant received notice to comply with the new requirements and thereupon instituted this suit in the New York courts for a declaratory judgment holding these provisions of the 1944 law unconstitutional and restraining their enforcement.

The bill alleged that the building was safe for occupancy as a lodging house and did not constitute a fire hazard or a danger to the occupants; that it complied with all building laws and regulations at the time of its construction; that part of it was fireproof and that the rest was so constructed as not to be dangerous to occupants; that the regulations existing prior to 1944 were adequate and sufficient to prevent loss of life in lodging houses of this particular type. It was further alleged that this lodging

[1] L. 1929, ch. 713; Cons. L. ch. 61A.

[2] L. 1944, ch. 553.

[3] *Id.*, § 4.

[4] This followed a disastrous fire in an old lodging house in New York City in which there was a considerable loss of life.

house has a market value of about $25,000, that the cost of complying with the 1944 law would be about $7,500; and that the benefits to be obtained by the changes were negligible. By reason of those circumstances the 1944 law was alleged to violate the due process clause of the Fourteenth Amendment. It was also alleged to violate the equal protection clause of the Fourteenth Amendment since it was applicable to lodging houses "existing" prior to the 1944 law but not to identical structures erected thereafter. Appellee answered, denying the material allegations of the bill, and moved to dismiss. The Supreme Court granted the motion. The Appellate Division affirmed without opinion. 269 App. Div. 691. On appeal to the Court of Appeals the judgment was likewise affirmed without opinion. 294 N. Y. 917. The case is here on appeal, the Court of Appeals having certified by its remittitur that questions involving the Fourteenth Amendment were presented and necessarily passed upon. 295 N. Y. 567.

Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. *Olsen* v. *Nebraska*, 313 U. S. 236, 246. Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498. We are dealing here with a less drastic measure. But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. *Hada-*

check v. *Los Angeles, supra*, p. 410. And see *Chicago, B. & Q. R. Co.* v. *Nebraska*, 170 U. S. 57; *Hutchinson* v. *Valdosta*, 227 U. S. 303. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block* v. *Hirsh*, 256 U. S. 135, 155. And see *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531. Appellant may have a lodging house far less hazardous than the other existing structures regulated by the 1944 law. Yet a statute may be sustained though some of the objects affected by it may be wholly innocent. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 204. The question of validity turns on the power of the legislature to deal with the prescribed class. That power plainly exists here.

Appellant's claim of lack of equal protection is based on the following argument: The 1944 law applies only to existing lodging houses; if a new lodging house were erected or if an existing building were converted into a lodging house, the 1944 law would be inapplicable. An exact duplicate of appellant's building, if constructed today, would not be under the 1944 law and hence could be lawfully operated without the installation of a wet pipe sprinkler system. That is said to be a denial of equal protection of the laws.

The difficulty is that appellant has not shown that there are in existence lodging houses of that category which will escape the law. The argument is based on an anticipation that there may come into existence a like or identical class of lodging houses which will be treated less harshly. But so long as that class is not in existence, no showing of lack of equal protection can possibly be made. For under those circumstances the burden which is on one who challenges the constitutionality of a law could not be satisfied. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584. The legislature is entitled to hit the evil that exists. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Bryant* v. *Zimmerman*, 278 U. S. 63; *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499. It need not take account of new and hypothetical inequalities that may come into existence as time passes or as conditions change. So far as we know, the 1944 law may have been designed as a stop-gap measure to take care of a pressing need until more comprehensive legislation could be prepared. It is common knowledge that due to war conditions there has been little construction in this field in recent years. By the time new

lodging houses appear they, too, may be placed under the 1944 law; or different legislation may be adopted to take care both of the old and the new on the basis of parity. Or stricter standards for new lodging houses may be adopted. In any such case the asserted discrimination would have turned out to be fanciful, not real. The point is that lack of equal protection is found in the actual existence of an invidious discrimination (*Truax* v. *Raich*, 239 U. S. 33; *Skinner* v. *Oklahoma*, 316 U. S. 535), not in the mere possibility that there will be like or similar cases which will be treated more leniently.

Affirmed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice JACKSON took no part in the consideration or decision of this case.